Supreme Court, U.S.
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No.____

In The
Supreme Court of the United States

THE HONORABLE JOHN SIEFERT, *Petitioner,*

v.

JAMES C. ALEXANDER, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for a Writ of Certiorari

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Questions Presented

This Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) established that the First Amendment protects judicial campaign speech and subjects regulation of such speech to strict scrutiny. Wisconsin, like many other states, has adopted judicial speech restrictions that ban judicial candidates from personally soliciting campaign contributions and from endorsing other candidates for public office. The Seventh Circuit below rejected the strict scrutiny standard that was employed in *White* and that has been employed by the Sixth, Eighth, and Eleventh Circuits. Instead, it upheld these judicial candidate speech restrictions by applying intermediate scrutiny reserved for contribution limits to the personal solicitation clause and a balancing test traditionally used in the context of federal employees to the endorsement clause. Based on this decision, in *Bauer v. Shepard*, No. 09-2963, WL 3271960 (7th Cir. Aug. 20, 2010), for which a writ of certiorari has also been sought, the Seventh Circuit has now also upheld prohibitions on other common and essential judicial campaign activities, ultimately requiring judicial candidates to seek government permission to announce their views on disputed political issues, which this Court in *White* held could not be constitutionally required.

(1) Whether restrictions on judicial campaign speech are uniformly subject to strict scrutiny under the First and Fourteenth Amendments to the United States Constitution, which should be applied here;

(2) Whether the prohibition on judicial candidates soliciting funds for their own campaign is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

(3) Whether the prohibition on judicial candidates soliciting funds for their own campaign is unconstitutional as applied to personal phone calls, signing fundraising letters, and personally inviting potential donors to fundraisers, in violation of the First And Fourteenth Amendments to the United States Constitution;

(4) Whether the prohibition on judicial candidates endorsing other candidates for public office is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

(5) Whether the prohibition on judicial candidates endorsing other candidates for public office is unconstitutional as applied to endorsing Presidential candidates, in violation of the First and Fourteenth Amendments to the United States Constitution.

Parties to the Proceedings

The following individuals and entities are parties to the proceedings in the court below:

The Honorable John Siefert, *Plaintiff-Appellee*;

James C. Alexander, Larry Bussan, Ginger Alden, Leo Bach, Jennifer Orales, John R. Dawson, David A. Hansher, Gregory A. Peterson, *Defendants-Appellants*.

Corporate Disclosure Statement

The Petitioner is not a corporation, has no parent corporation, and has no publicly held stock. Rule 29.6.

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Petition for a Writ of Certiorari

Petitioner Judge Siefert respectfully requests a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit in this case.

Opinions Below

The order of the court of appeals affirming in part and reversing in part the district court is at 608 F.3d 974. App. 1a. The district court opinion is at 597 F. Supp. 2d 860. App. 45a. Denial of rehearing en banc is at 2010 WL 3397459. App. 107a.

Jurisdiction

The court of appeals upheld the district court's decision on June 14, 2010. App. 1a. Petitioner's Petition for Rehearing En Banc was denied August 31, 2010. App. 107a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I is in the Appendix at 110a.
Wisconsin Supreme Court Rule 60.06(2)(b)1 is at 110a.
Wisconsin Supreme Court Rule 60.06(2)(b)4 is at 110a.
Wisconsin Supreme Court Rule 60.06(4) is at 111a.

Statement of the Case

This case presents a constitutional challenge by Judge Siefert, a sitting judge and judicial candidate in Wisconsin's 2011 election, to Wisconsin's judicial personal solicitation and endorsement clauses, Wisconsin Supreme Court Rules ("SCR") 60.06(4), 60.06(2)(b)(4), because the clauses impose a substantial and unconstitutional limit on his political speech by banning his personal solicitation of campaign

contributions and his endorsement of other candidates for public office.[1] Specifically, Wisconsin prohibits judicial candidates from "personally solicit[ing] or accept[ing] campaign contributions," SCR 60.06(4), and from "publicly endors[ing] or speak[ing] on behalf of its candidates or platforms," SCR 60.06(2)(b)(4). These provisions limit Judge Siefert's ability to engage in protected political speech and are unconstitutional on their face and as applied to the endorsements and solicitations he desires to make.

I. The Facts.

Wisconsin state court judges are selected through a process of non-partisan judicial elections. Regulation of judicial conduct, as well as the conduct of candidates for judicial office, is governed by the Wisconsin Code of Judicial Conduct ("the Canons"), found in Chapter 60 of Wisconsin's Supreme Court Rules. SCR 60.01 *et seq.* The Code's solicitation clause provides that a "judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions." SCR 60.06(4). And the endorsement clause bans judges and judicial candidates from "[p]ublicly endors[ing] or speak[ing] on behalf of [a political party's] candidates or platforms." SCR 60.06(2)(b)(4). These clauses, amended in 2007, were recognized by three Wisconsin Supreme Court justices to be constitutionally infirm under the First Amendment, who dissented from their adoption. AC ¶ 16 and Ex. 1.

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[1] The case below also involved a challenge to Wisconsin's partisan affiliation ban. SCR 60.06(2)(b)1. The Seventh Circuit found the ban unconstitutional, App. 11a-16a. This ruling has not been appealed by the state.

The Petitioner, Judge John Siefert, has served as a Milwaukee County Circuit Court Judge since August 1, 1999. AC ¶ 18.[2] He is up for reelection in 2011. AC ¶ 18. As a judge, he is bound by the Canons and potentially subject to discipline for his conduct. AC ¶ 18.

Judge Siefert wanted to make personal phone calls and personal invitations to fundraising events, and sign letters seeking contributions to his upcoming 2011 election campaign. AC ¶ 21. He wanted to endorse then-Senator Obama for President in 2008 and would like to endorse candidates during the upcoming 2011 election cycle. AC ¶ 20. Despite the fact that none of these activities would bias him for or against a particular party or class of parties, nor impair his ability to be openminded, Judge Siefert is prohibited from engaging in such political speech and fears discipline if he violated the clauses' prohibitions. AC ¶ 21.

Respondents, as members of Wisconsin's Judicial Commission, are charged with investigating possible misconduct of Wisconsin judges. Wis. Stat. § 757.85. "Misconduct" includes the "[w]illful violation of a rule of the code of judicial ethics." Wis. Stat. § 757.81(4)(a). AC ¶ 7. Judge Siefert seeks to permanently enjoin their enforcement of the clauses. AC ¶ 48.

II. The History of the Litigation

Judge Siefert filed his Verified Complaint on March 3, 2008. On February 17, 2009, on cross-motions for summary judgment, the district court declared the

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[2] Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief ("AC") was verified by Judge Siefert.

challenged canons unconstitutional. Respondents appealed the decision on March 18, 2009, resulting in a reversal of the district court's ruling on the endorsement and solicitation clauses on June 14, 2010. Judge Siefert sought rehearing on banc, which was denied with Judges Rovner, Wood, Williams, and Hamilton dissenting, on August 31, 2010. App. 108a.

Reasons for Granting the Petition

The Seventh Circuit's ruling in this case, compounded by its subsequent ruling in *Bauer v. Shepard*, No. 09-2963, WL 3271960 (7th Cir. Aug. 20, 2010), has vitiated the important First Amendment protections for judicial campaign speech established in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) ("*White I*"). In so doing, the Seventh Circuit establishes a regime where ordinary, standard, and indeed, essential, campaign practices of judicial candidates are prohibited and where judicial candidates will be required to seek government approval before announcing their views on disputed legal and political issues. This result is contrary to this Court's holdings in *White I*, *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*"), and *Citizens United v. FEC*, 130 S.Ct. 876 (2010).

This new regime also conflicts with decisions of several other circuits that have reviewed restrictions like those at issue here, including decisions of the Sixth, Eight and Eleventh Circuits and arguably the Third and a previous decision of the Seventh. This Court should grant certiorari and decide this case on the merits.

I. This Case Involves An Important Question of Law Whether Restrictions on Judicial Candidate Speech Are Subject to Strict Scrutiny, Which Should be Applied Here.

Political speech traditionally enjoys the greatest constitutional protection under the First Amendment of the United States Constitution, with restrictions on it subject to strict scrutiny. *See Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

In *White I*, this Court reviewed Minnesota's announce clause, which prohibited judicial candidates from stating their views on disputed legal and political issues and applied strict scrutiny to it, recognizing that the clause "both prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." 536 U.S. at 774.

In reviewing Minnesota's announce clause, the *White I* court affirmatively cited *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993), which had applied strict scrutiny to strike Illinois' announce clause. In doing so, the Seventh Circuit acknowledged a conflict with the Third Circuit in *Stretton v. Pennsylvania*, 944 F.2d 137 (3d Cir. 1991), which had upheld Pennsylvania's announce clause, while applying strict scrutiny to it. *Id.* at 141, 146. While *White I* resolved the conflict by effectively overruling the *Stretton* case and upholding the Seventh Circuit *Buckley* case, both cases applied strict scrutiny to the judicial campaign speech rstrictions before them.

Likewise, on remand from the *White I* decison, the

Eighth Circuit in *Republican Party of Minnesota v. White*, 416 F.3d 738 (2005) (*White II*) applied strict scrutiny. The en banc *White II* court reviewed numerous other judicial campaign speech canons, including Minnesota's personal solicitation clause, which stated: "A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support." *Id.* at 746. Adopting the *White I* rationale, that court recognized judicial campaign canons are inherent content-based and applied strict scrutiny. 416 F.3d at 749, 763-64. Under strict scrutiny review, the canons were held unconstitutional because they failed to protect litigants from purported partiality concerns. *Id.* at 754, 765-66.

This holding was reinforced in the recent Eighth Circuit decision *Wersal v. Sexton*, No. 09-1578, 2010 WL 2945171 (8th Cir. July 29, 2010). There, the Eighth Circuit again followed *White I* as well as *Citizens United* by applying strict scrutiny to Minnesota's personal solicitation and endorsement clause. *Wersal*, 2010 WL 2945171 at *3. Significant to the *Wersal* court was this Court's view in *Citizens United* that "'political speech simply cannot be banned or restricted as a categorical matter.'" *Id.* at *3 (*quoting Citizens United*, 130 S.Ct. at 898). Under strict scrutiny, both the personal solicitation clause and the endorsement clause failed. *Id.* at *12, *15.

In *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the Eleventh Circuit reviewed challenges to various Georgia judicial campaign canons, including its personal solicitation clause, which precluded judicial candidates from "themselves solicit[ing] campaign funds, or solicit[ing] publicly stated support." *Id.* at

1315. Like the *White II* and *Wersal* court, the *Weaver* court applied strict scrutiny, *id.* at 1319, and found that the challenged canons failed to serve any compelling interest in judicial impartiality. *Id.* at 1322, 1323.

The Sixth Circuit recently weighed in on this issue in *Carey v. Wolnitizek,* Nos. 08-6468, 08-6538, 2010 WL 2771866 (6th Cir. July 13, 2010). Reviewing a challenge to a commits clause, a party affiliation clause, and a personal solicitation clause, the court held that "[s]trict scrutiny applies to all three aspects of this First Amendment challenge. *White,* for one, suggests as much." *Id.* at *6. The court noted that "[n]ot one of the Justices, not even one of the four dissenters, objected to the application of strict scrutiny," and that, if it did not broadly apply to all judicial campaign speech, "it is difficult to understand why the Court exercised its discretion in reviewing *White*, given that virtually the entire analysis is premised on the applicability of strict scrutiny and given that the outcome of the case under a lower level of scrutiny is far from clear." *Id.* at *6. Recognizing the content-based nature of the challenged clauses, *id.* at *7, the Sixth Circuit went on to find the partisan affiliation and personal solicitation clauses facially unconstitutional, remanding ambiguities in the scope of the commits clause to the district court for further consideration. *Id.* at *17.[3]

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[3]Efforts to narrow *White I*'s application by looking to this Court's judicial recusal case *Caperton v. A.T. Massey Coal Company*, 129 S.Ct. 2252 (2009) has gained limited traction. *See, e.g., Bauer v. Shepard*, 634 F. Supp. 2d 912

Despite *White I* and the circuits' consistent application of the strict scrutiny standard to restrictions on judicial campaign speech, the Seventh Circuit has now determined that other, more forgiving standards apply. In finding the personal solicitation clause constitutional, the Panel employed "closely drawn" scrutiny, relying on *Buckley*'s application of "less rigorous 'closely drawn' scrutiny" to campaign contribution limits. App 27a (*quoting Buckley*, 424 U.S. at 25). And in finding the endorsement clause constitutional, the Seventh Circuit employed a balancing test applicable to restrictions on political speech by government employees. App. 17a. The resulting effect has been to outlaw ordinary and essential campaign speech by judicial candidates.

II. The Seventh Circuit Establishes A Regime That Conflicts With this Court.

In analyzing the clauses before it, the *Siefert* court attempts to harmonize what it perceives as two conflicting Supreme Court precedents. App. 11a. It acknowledges that in *White I*, this Court applied strict scrutiny to judicial speech regulations. App. 8a. But then it contends that *White I* left open the possibility that the balancing test applicable to government employees might apply, App. 8a, and that this Court uses a lower standard of review for restrictions on contributions than on spending in *Buckley*. App. 27a. Because the personal solicitation clause relates to

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(N.D. Ind. 2009). This Court in *Citizens United*, 130 S.Ct. 876 has firmly closed that door: "*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." *Id.* at 910.

contributions, the lower court applied *Buckley*'s "closely drawn" scrutiny rather than strict scrutiny. App. 27a. And because it reasoned that the endorsement clause reached a "different form of speech that serves a purpose distinct from the speech at issue in *White I*," it adopted the balancing approach used for government employee speech in *U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548 (1973), *Garcetti v. Ceballos*, 547 U.S. 410 (1951), and *Pickering v. Bd. Of Ed. Of Twp. High School. Dist. 205, Will County, Ill.*, 391 U.S. 563 (1968). App. 17a.

The use of anything but strict scrutiny to analyze these canons conflicts with this Court's jurisprudence.

A. Closely Drawn Scrutiny Is The Wrong Standard.

The personal solicitation clause prohibits judicial candidates from "personally solicit[ing] or accept[ing] campaign contributions." SCR 60.06(4). The Seventh Circuit applied intermediate scrutiny, reasoning that since it was "dealing with regulation of campaign contributions, we therefore proceed with the analysis under *Buckley*," which distinguished "restrictions on spending by candidates and parties [and] reviewed [them] with strict scrutiny," from "restrictions on contributions [that] are reviewed under less rigorous 'closely drawn' scrutiny." App 27a-28a.

In *Buckley*, this Court held that contribution limits are subject to lesser scrutiny than spending restrictions, 424 U.S. at 25, because contributions are more an exercise of associational rights than speech rights. Contributions can be limited, provided they are not too low, *Randall v. Sorrell*, 548 U.S. 230, 232

(2006), and serve a sufficiently important interest. *McConnell v. FEC*, 540 U.S. 93, 135 (2003). However, the personal solicitation clause limits speech, not contributions, based on the topic and the speaker. *See Carey*, WL 2771866 at *8.

This Court's precedent has consistently held that content-based speech regulations are subject to strict scrutiny. *See, e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Rosenberger v. Rector*, 515 U.S. 819, 828-29 (1995). That the Seventh Circuit applied less that strict scrutiny to a content-based speech restriction conflicts with that precedent, warranting review.

B. A Balancing Test Is The Wrong Standard.

The endorsement clause prohibits judicial candidates from "[p]ublicly endors[ing] or speak[ing] on behalf of [a political party's] candidates or platforms." SCR 60.06(2)(b)(4). The Seventh Circuit reasoned that, because the clause's purpose is distinct from announcing views, it would use the governmental employee "balancing approach, not strict scrutiny, [a]s the appropriate method of evaluating the endorsement rule." App. 17a.

This Court established a balancing test to review government employee speech regulations, reasoning that, when public employees are engaged in their official duties, they are not acting as citizens and so their speech is not protected by the First Amendment. *Garcetti*, 547 U.S. at 421. Instead, their speech rights are balanced against the state's interest in performing its important governmental function. *Id.* at 420. Thus the district attorney in *Garcetti* who, during the

exercise of his duties, wrote a disposition memo advising his superior on a course of action could legitimately be disciplined for the content of the memo.

However, the state cannot force an employee to relinquish her constitutional rights as a citizen in order to secure public employment. *Pickering*, 391 U.S. at 568. Thus, teachers cannot be dismissed because of speech they engaged in outside of their employment, absent a showing of defamation or other constitutionally-recognized circumstance. *Id.* at 574.

Indeed, the *Letter Carriers* decision, which addressed the Hatch Act's political speech restriction on government employees, was directed towards "protect[ing] employees' rights, notably their right to free expression," *United States v. National Treasury Employees Union*, 513 U.S. 454, 471 (1976), by preventing ranking officials from making "advancement in the Government service ... depend on political performance." *Letter Carriers*, 413 U.S. at 566; *see also Elrod v. Burns*, 427 U.S. 437, 366-67 (1976).

None of these cases have ever stood for the proposition that elected officials' speech, including judicial candidates' speech, could likewise be restricted. *See* App. 35a (Rovner, J., dissenting). It is one thing to regulate the speech of unelected public employees who only answer to the government as their employer; it is quite another to regulate the campaign speech of public officials, who are required to stand for election, who are beholden to the public at large. App. 35a.

Indeed, the fundamental purpose of the First Amendment's speech clause is to protect political speakers during campaigns: "'The role that elected

officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *White I*, 536 at 781 (*quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222-223 (1989)). Thus, "'If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process ... the First Amendment rights that attach to their roles'." *White I*, 536 U.S. at 788 (*quoting Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). Requiring a judicial candidate to run for office, but then prohibiting her from campaigning, violates the First Amendment.

Even if the government employee cases were not exclusively directed at the peculiarities of unelected, government employees, judicial campaign speech restrictions present another problem: They apply to all judicial candidates, whether incumbent or challenger. At most, the balancing test could apply only to judges' speech, effectively establishing two speech standards, depending on the speaker. Such discriminatory speech standards contravene this Court's holding in *Davis v. FEC*, 128 U.S. 2759 (2008), which unequivocally denounced asymmetrical campaign restrictions among competing candidates. *Id.* at 2764 ("This Court has never upheld the constitutionality of a law that imposes different ... limits for candidates competing against each other."). A balancing test is thus not only inapplicable; it is unconstitutional.

III. The Seventh Circuit Decision Conflicts With Other Circuit Decisions On the Same Important Matter.

As evidenced above, the Seventh Circuit's decision to apply a lesser standard of review to the personal solicitation clause and an balancing test to the endorsement clause conflicts not only with *White I* but with numerous other circuits that have applied *White I* in other judicial speech contexts. This fundamental error resulted in a improper conclusion that also conflicts with those circuits: That the personal solicitation clause and the endorsement clause are constitutional. This Court should grant the writ to harmonize the Seventh Circuit's ruling with those of other circuits.

A. The Personal Solicitation Clause Is Unconstitutional.

Judge Siefert wants to make personal phone calls asking for funds, to make personal invitations to potential donors to his campaign's fundraising events, and to sign letters seeking contributions to his upcoming 2011 election campaign. (Siefert Decl., Doc. 34, ¶ 24.) He is prohibited by Wisconsin's personal solicitation clause, which states that a "judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions." SCR 60.06(4). Similar canons prohibiting judicial candidates from making personal solicitations have been struck down by the Sixth, Eighth and Eleventh Circuits. *Wersal*, 2010 WL 295171; *White II*, 416 F.3d at 766; *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002); *Carey*, 2010 WL 2771866. *But see Stretton v. Disciplinary Board of the Supreme Court of Penn.*,

944 F.2d 137, 146 (3d Cir. 1991) (upholding Pennsylvania's personal solicitation clause before *White I*).

The Eleventh Circuit in *Weaver* held Georgia's solicitation clause unconstitutional. Georgia's Code of Judicial Conduct provided that judicial candidates "shall not themselves solicit campaign funds, or solicit publicly stated support." *Id.* Canon 7(B)(2). The *Weaver* court reasoned that, under strict scrutiny, any impartiality interest of the state was not served by the clause because

> even if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, this risk is not significantly reduced by allowing the candidate's agent to seek these contributions and endorsements on the candidate's behalf rather than the candidate seeking them himself. Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support.

Id. at 1322-23. The clause prohibits a candidate's speech while "hardly advancing the state's interest in judicial impartiality at all." *Id.* at 1323.

In *White II*, the Eighth Circuit struck down Minnesota's personal solicitation clause because it was not narrowly tailored to serve a compelling interest in impartiality. *Id.* at 765-66. Minnesota's judicial code only permitted a candidate's committee to receive contributions, with the committee itself prohibited from informing the candidate who had solicited and

who had not. *Id.* at 765; 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 5(B)(2). That bias for or against a party or judicial closedmindedness would presumptively result if a contributor or non-contributor appear before him would be a "'challenge to the credulous.'" *Id.* at 766 (*quoting White I*, 536 U.S. at 780).

In *Wersal*, the Eighth Circuit considered Minnesota's revised solicitation clause. The new clause, while banning personal solicitations, Minn. Stat. Ann., Code of Judicial Conduct, Canons 4.1(A)(6) & 4.1(A)(4)(a), allowed judicial candidates to ask for funds from audiences greater than 20 people; to sign letters soliciting contributions; and to solicit from family members, significant others, and judges over which the candidate has no supervisory or appellate authority. 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.2(B)(3). The court, recognizing that the canon was at least more narrowly tailored than the personal solicitation clause struck down in *White II*, *Wersal*, WL 2945171 at *14, still found the clause failed strict scrutiny because, as in *Weaver*, a candidate's campaign committee could solicit on her behalf—and it is the act of soliciting, not the identity of the solicitor, that is relevant to the State's interest in preserving impartiality. *Id* at *14. Moreover, less restrictive means already existed to preserve that interest: Minnesota prohibits judicial candidates from knowing the source of contributions to their campaign, 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.2(A)(5), and recusal, in cases of clear bias, was always available to litigants. *Wersal*, WL 2945171 at *14. The court dismissed any coercive aspect to face-to-face solicitation, asserting that "it [is] highly unlikely

that after such a fleeting encounter, a candidate will remember which solicited person indicated a likelihood of contributing to the campaign or indicated a refusal to do so." *Id.* at *14.

Following the Eighth and Eleventh Circuits, the Sixth Circuit in *Carey* found Kentucky's personal solicitation clause unconstitutional because it reached not only in-person solicitations by judges and solicitation of parties currently before the court, but also signing letters and solicitation for large groups. *Carey*, WL 2771866 at *13. That it allowed a candidate to send thank-you notes also was problematic to the court. *Id.* All these omissions, said the Sixth Circuit, "suggest[] that the only interest at play is the impolitic interpersonal dynamics of a candidate's request for money, not the more corrosive reality of who gives and how much." *Id.*

The only circuit that has upheld the personal solicitation clause is the Third Circuit in *Stretton*, 944 F.2d 137. Decided prior to *White I*, the Third Circuit found that the personal solicitation clause served a compelling interest in preventing "the appearance of coercion or expectation of impermissible favoritism." *Id.* at 146. Significantly, the *White I* court recognized impartiality, not coercion, as a compelling interest. *White I*, 536 U.S. at 774. And more crucially, the *Stretton* court analyzed the clause only as to face-to-face solicitations without properly analyzing the larger scope—and thereby the narrow tailoring—of the clause. *Stretton*, 944 F.2d at 145-46; *see Carey*, WL 2771866 at *13 (discussing the overinclusiveness of the personal solicitation clause). Its value is dubious.

Despite the post-*White I* consensus among the circuits, the Seventh Circuit again chose to deviate, by finding the personal solicitation clause constitutional.[4] *See* App. 109a (Rovner, J., dissenting) ("both the Sixth and Eighth circuits have struck down as unconstitutional states statutes that restricted the First Amendment rights of judge and judicial candidates. ... Our divergent opinion on this issue is an outlier.").

Relying on *Buckley*, the court below concluded that because personal solicitations related to raising funds rather than spending funds for campaigns, "closely drawn" scrutiny applied. Yet regardless of the level of scrutiny, it contended that the solicitation clause survives. App. at 28a. Disavowing coercion as a compelling state interest, App. at 30a, the Seventh Circuit nevertheless held that "the personal solicitation itself presents the greatest danger to impartiality and its appearance." App. at 31a. That candidates can review the source of their funds and that the clause reaches beyond quid pro quo corruption to ban personal solicitation of family members was not enough for the court to find the clause inadequately tailored.[5]

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[4]The Seventh Circuit cites *Stretton* for support of its lesser standard of review. App. at 27a. This is misplaced. *See Stretton*, 944 F.2d at 146 ("A compelling state interest is present and the means currently employed are narrowly tailored to it. ... Accordingly, we agree with the district court's determination that Canon 7(B)(2) [—the personal solicitation clause—] does not offend the Constitution.")

[5]The court also entirely ignores Judge Siefert's as-applied challenge, which seeks an exception to the ban in

This analysis is fundamentally at odds with the Sixth, Eighth, and Eleventh Circuit, which recognized that it is the contribution, not the solicitation, that triggers any compelling state interest and as a result, struck down the solicitation clause. *See Wersal,* WL 2945171 at *14; *Carey,* WL 2771866 at *13; *Weaver,* 309 F.3d at 1322-23; *White II,* 416 F.3d at 766.

It is also at odds with the Sixth Circuit because it fails to address Judge Siefert's as-applied claims. Even if a categorical ban of personal solicitations is constitutional, whether Judge Siefert's personal phone calls, personal invitations to fundraisers, or signatures on fundraising letters amount to the type of solicitation that the Seventh Circuit found so offending is unlikely. While the *Carey* court found that the inclusion of such indirect solicitations made the clause facially underinclusive, *Carey,* WL 2771866 at *13, at minimum, an exception for Judge Siefert's desired solicitations is warranted.

To reconcile these inter-circuit conflicts, this Court should grant this writ.

B. The Endorsement Clause Is Unconstitutional.

In 2008, Judge Siefert wanted to endorse then-Senator Obama for President. As a judicial candidate in Wisconsin's upcoming 2011 election cycle, he would likewise like to endorse candidates to announce his position on disputed political issues, both as to whether Senator Obama should be elected President and as a

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the form of personal phone calls, signing of fundraising letters, and personally inviting potential donors to fundraising events.

means by which to state his own views as a candidate. (Siefert Decl., Doc. 34, ¶ 18.) However, the endorsement clause provides that no judge or judicial candidate may "[p]ublicly endorse or speak on behalf of [a political party's] candidates or platforms." SCR 60.06(2)(b)(4). An exception to this provision allows partisan political office holders seeking election or appointment, as well as judge-elects to "continue to engage in partisan political activities required by his or her present position." SCR 60.06(2)(c). Because the endorsements Judge Siefert desires to make are not required by his position, they are prohibited.

The endorsement clause Judge Siefert challenges is similar to the clause challenged in *Wersal*. The endorsement clause there prevented a judicial candidate from "publicly endors[ing] or, except for the judge or candidate's opponent, publicly oppos[ing] another candidate for public office." 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.1(A)(3). Mr. Wersal wanted to endorse a candidate for Minnesota's Supreme Court, a District Court judge, and a candidate for Congress. *Wersal,* 2010 WL 2945171 at *1. Applying *White I*'s strict scrutiny analysis because the "restriction depends wholly upon the subject matter of the speech for its invocation" and "burdens core political speech," *id.* at *8, the Eighth Circuit found the clause overinclusive because, rather than solely preventing public displays of favoritism that might demonstrate bias for or against a party, it also undermines the endorser's ability to "denote[] a particular subset of issues and policies with which the endorsing candidate may subscribe." *Id.* at *9. It also found the clause underinclusive because it allows

endorsements of public officials and of acts or policies of non-candidates. *Id.* at *10. The court ruled the clause facially unconstitutional.

In support of its conclusion, the *Wersal* court followed *White II*, which held that judicial candidates had the right to receive endorsements. *Id.* at 754. And indeed, it is hard to see how, if accepting endorsements is consistent with judicial impartiality, making endorsements would not be so. In the case of a judge or candidate who receives an endorsement, there is a risk, however slight, that the judge or candidate will be grateful to the endorsing party, as the endorsement has conferred a benefit on the candidate.[6] The same is not true, however, when a judge or candidate makes an endorsement, and simply makes public a preference the candidate already has. Endorsements primarily benefit the endorsee, not the endorser—the primary benefit to the endorser is a short hand way to announce her views.[7] Since candidates are free, under *White II*, to accept such endorsements, they must be free to make such endorsements as well. *Id.*

Likewise, the *Wersal* court found compelling the *White II* court's recognition that "'the underlying rationale for [a state provision banning the acceptance

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[6] In the same way, a judge who is appointed to the bench by a partisan political official such as a governor is also likely to feel gratitude.

[7] While a judge may make an endorsement in exchange for some political benefit from the endorsed party, this does not implicate judicial impartiality, as making an endorsement is not itself an exercise of the judicial office and does not affect how a judge may rule in any case.

of endorsements and membership in a political party]—that *associating with a particular group* will destroy a judge's impartiality—differs only in form from that which purportedly supports the announce clause—that *expressing one's self on particular issues* will destroy a judge's impartiality," *White II,* 416 F.3d at 754-55." *Wersal,* 2010 WL 2945171 at *9. A judge or candidate associating with another candidate by means of an endorsement is no more of a threat to judicial impartiality than is that judge or candidate associating with a political party or political interest group, or expressing himself on particular issues.

Just like Mr. Wersal, Judge Siefert wished to publicly endorse candidates for public office, in his case, candidates like Barack Obama. The purpose of his endorsement was to announce his position on a disputed political issue, both as to whether Senator Obama should be elected President and as a means by which to state his own views as a candidate. (Siefert Decl., Doc. 34, ¶ 18.) Because his endorsement served as a "shorthand for the views a judicial candidate holds," *White II*, 416 F.3d at 754, *Wersal,* 2010 WL 2945171 at *9, the endorsement clause prohibits judicial candidates from announcing their views in violation of *White I.*

Again, the Seventh Circuit chose to embark on its own analysis, concluding that the endorsement clause is constitutional because judges who publicly endorse undermine the State's interest in impartiality. App. 25a-26a. Moreover, the court determined that an endorsement is of limited value, and thus warrants less constitutional protection. App. 23a. That endorsements in nonpartisan elections are permitted

under the clause was not underinclusive enough for "the scales to tip in favor of the plaintiff's right to speak." App. at 24a.[8] *But see* App. at 44a (Rovner, J. dissenting) ("Once Wisconsin greased the slope for non-partisan endorsements, it should not have been surprised that partisan endorsements could come sliding after. Wisconsin has failed to demonstrate that its endorsement ban is narrowly tailored to prevent the harm it asserts.").

Even if a categorical ban on endorsements were constitutional, the Seventh Circuit also failed to consider Judge Siefert's as-applied claims. An endorsement of then-Senator Obama cannot credibly create sufficient impartiality concerns to warrant proscribing it. The likelihood of Senator Obama appearing in Judge Siefert's court after successfully running for President are slim, and in the event he did so appear, any credible bias claim could be examined and addressed through recusal. *See Wersal,* 2010 WL 2945171 at *10-11 (contending that recusal is the least restrictive means of addressing the impartiality concerns purportedly advanced through the endorsement clause).

The *Siefert* court's conclusions directly conflict with the Eighth Circuit, warranting this Court's review.

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[8]Notably, the Seventh Circuit recognized that this underinclusiveness could make the endorsement clause unconstitutional. *See* App. at 24a ("Were we to consider this provision under strict scrutiny, this underinclusiveness could be fatal to the rule's constitutionality.")

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari and decide this matter on the merits.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN SIEFERT, *Plaintiff-Appellant,* *v.* JAMES C. ALEXANDER ET AL., IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE WISCONSIN JUDICIAL COMMISSION, *Defendants-Appellees.* [a complete list of Defendants is furnished in the Petition's Parties to Proceedings Section]	No. 09-1713 D.C. No. 3:08-CV-126 OPINION

Appeal from the United States District Court
for the Western District of Wisconsin
Barbara B. Crabb, District Judge

Argued: September 17, 2009

Decided: June 14, 2010

Before FLAUM, ROVNER, and TINDER, Circuit Judges.

OPINION

TINDER, Circuit Judge.

The plaintiff, John Siefert, is an elected Wisconsin circuit court judge in Milwaukee County. He would like

to state his affiliation with the Democratic Party, endorse partisan candidates for office, and personally solicit contributions for his next election campaign, but is concerned because these activities are prohibited by the Wisconsin Code of Judicial Conduct. Rather than violate the code and face discipline, Siefert filed suit under 42 U.S.C. § 1983 for declaratory and injunctive relief against the members of the Wisconsin Judicial Commission, the body that enforces the Code of Judicial Conduct. After considering the parties' cross-motions for summary judgment, the district court granted Siefert's motion, declared the rules prohibiting a judge or judicial candidate from announcing a partisan affiliation, endorsing partisan candidates, and personally soliciting contributions unconstitutional, and enjoined the defendants from enforcing these rules against Siefert. The Commission appeals. We affirm the district court's holding on the partisan affiliation ban but reverse the district court's ruling that the bans on endorsing partisan candidates and personally soliciting contributions are unconstitutional.

I. Background

Plaintiff John Siefert was first elected to the circuit court for Milwaukee County in 1999 and has served as a judge since. Prior to being elected a circuit court judge, he was a member of the Democratic Party and participated in a number of partisan activities. He served as a delegate to the Democratic National Convention, twice ran as a Democrat for the state legislature, twice ran as a Democrat for county treasurer (holding that office from 1990 to 1993), and served as an alternate elector for President Bill Clinton

in 1992. He would like to once again join the Democratic Party and list his party membership in response to candidate questionnaires. He believes membership in the Democratic Party would communicate his desire for social justice and peace, but does not wish to appeal to partisanship as a candidate or as a judge. Siefert would also like to endorse partisan candidates for office. At the time he initiated this suit, he sought to endorse now-President Barack Obama; he expressed a desire to endorse Jim Doyle for governor of Wisconsin in 2010[1] and President Obama if he decides to run for reelection in 2012. Finally, Siefert would like to solicit contributions for his upcoming 2011 campaign by making phone calls to potential contributors, signing his name to fundraising letters, and by personally inviting potential donors to fundraising events. He would continue to use a campaign committee to handle the ministerial tasks of fundraising and to collect and report donations.

The defendants are the executive director and members of the Wisconsin Judicial Commission (the "Commission"). The Commission investigates and prosecutes potential violations of the Wisconsin Code of Judicial Conduct. The Commission also issues, from time to time, advisory opinions on the interpretation of the Code of Judicial Conduct.

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[1]Jim Doyle has since announced that he will not run for another term as governor. *See* Lee Bergquist, Stacy Forster & Patrick Marley, *Doyle Won't Seek Reelection in 2010*, Milwaukee Journal Sentinel, Aug. 15, 2009, *available at* http:// www. jsonline. com/ news/ statepolitics/ 53302852. html.

Wisconsin conducts two sets of elections; one set (i.e., a primary and then general election) is held in the spring for positions filled through nonpartisan elections and the other is held in the fall for the partisan elected positions. Nonpartisan officeholders include judges of the circuit courts, court of appeals, and supreme court, as well as the state superintendent of public instruction, county board members, county executives, and municipal and school district officers. The election for these positions is nonpartisan in the sense that all candidates (who meet the eligibility requirements) appear on the ballot without party identification. Similarly, political parties have no power to slate candidates in the nonpartisan election. Wis. Const. art. VII, § 9; Wis. Stat. §§ 5.58, 5.60. A spring primary is necessary if more than two candidates meet the nomination requirements for a nonpartisan position. The top two vote-getters in the primary proceed to the nonpartisan April election, which is, in essence, a runoff. Wis. Stat. § 8.11; Wis. Blue Book 884 (2009-10). If only one or two candidates meet the nomination requirements, no primary is necessary. (Practically, it appears that incumbent judges, at least recently, are rarely challenged, and if so, are challenged by one opponent only and thus subject to only one election in April. *See* Laurel Walker, *Judicial Selections Not Quite Non-Partisan, Milwaukee Journal Sentinel*, Dec. 25, 2009, *available at* http:// www. jsonline. com/ news/ statepolitics/ 80121422. html). Voting for offices filled through partisan elections, including sheriff and district attorney, takes place in the fall with a primary election to choose a single candidate for each of the two major parties, followed

shortly thereafter by a head-to-head partisan general election. Wis. Blue Book 884; see Wis. Stat. §§ 5.64, 8.16.

Party affiliation has been absent from the ballot in Wisconsin's judicial elections since 1913, and the district court found, based on the work of a historian employed by the Commission, that a tradition of nonpartisanship had taken hold among judicial candidates even earlier. However, Wisconsin did not expressly prohibit judges from joining a political party until 1968, when it adopted a comprehensive code of judicial conduct. *See* Charles D. Clausen, *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, 83 Marq. L.Rev. 1, 2-3 (1999). In October 2004, the supreme court amended the code to extend a number of rules to cover judicial candidates in addition to sitting judges, including the prohibitions on party membership, partisan endorsements, and personal solicitation of campaign contributions. *See* Wisconsin Supreme Court Order 00-07, 2004 WI 134 (Oct. 29, 2004).

The plaintiff challenges three distinct provisions of the rules adopted in 2004. The challenged provisions are all contained in Wisconsin Supreme Court Rule 60.06:

> SCR 60.06 A judge or judicial candidate shall refrain from inappropriate political activity.
>
> ...
>
> (2) Party membership and activities.

(a) Individuals who seek election or appointment to the judiciary may have aligned themselves with a particular political party and may have engaged in partisan political activities. Wisconsin adheres to the concept of a nonpartisan judiciary. A candidate for judicial office shall not appeal to partisanship and shall avoid partisan activity in the spirit of a nonpartisan judiciary.

(b) No judge or candidate for judicial office or judge-elect may do any of the following:

1. Be a member of any political party.

2. Participate in the affairs, caucuses, promotions, platforms, endorsements, conventions, or activities of a political party or of a candidate for partisan office.

3. Make or solicit financial or other contributions in support of a political party's causes or candidates.

4. Publicly endorse or speak on behalf of its candidates or platforms.

(c) A partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect may continue to engage in partisan political activities required by his or her present position.

...

(4) Solicitation and Acceptance of Campaign Contributions. A judge, candidate for judicial

> office, or judge-elect shall not personally solicit or accept campaign contributions. A candidate may, however, establish a committee to solicit and accept lawful campaign contributions. The committee is not prohibited from soliciting and accepting lawful campaign contributions from lawyers. A judge or candidate for judicial office or judge-elect may serve on the committee but should avoid direct involvement with the committee's fundraising efforts. A judge or candidate for judicial office or judge-elect may appear at his or her own fundraising events. When the committee solicits or accepts a contribution, a judge or candidate for judicial office should also be mindful of the requirements of SCR 60.03 and 60.04(4).

Siefert challenges the ban on party membership in SCR 60.06(2)(b) 1, the ban on partisan endorsements in SCR 60.06(2)(b)4, and the ban on personal solicitation of campaign contributions in SCR 60.06(4). He does not challenge the ban on "appeal[s] to partisanship and ... partisan activity" in SCR 60.06(2)(a) or the balance of SCR 60.06(2)(b). Nor does he challenge SCR 60.05, which directs judges to conduct their extra-judicial activities in a manner that does not cast doubt on the judge's capacity to act impartially, demean the judicial office, or interfere with the proper performance of judicial duties.

II. Discussion

A little background on the law surrounding the First Amendment rights of elected judges and judicial candidates is helpful to understanding what follows. In

2002, the Supreme Court decided *Republican Party of Minn. v. White* (*White I*), 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002). White I struck down a Minnesota canon of judicial conduct that prohibited judges and judicial candidates from announcing their views on disputed legal and political issues. *Id.* at 788, 122 S.Ct. 2528. The Court, applying a strict scrutiny approach, recognized a compelling state interest in preventing bias for or against particular litigants, but held that the state did not have a compelling interest in preventing a judge from having a preconception for or against particular views. *Id.* at 776-77, 122 S.Ct. 2528.

At the same time, *White I* left open some of the questions we deal with today. Justice Kennedy, a member of the five-vote majority and author of a separate concurrence, noted specifically that states are obligated to regulate the behavior of their judges to protect the integrity of their courts. "To strive for judicial integrity is the work of a lifetime. That should not dissuade the profession. The difficulty of the undertaking does not mean we should refrain from the attempt." *Id.* at 794, 122 S.Ct. 2528 (Kennedy, J., concurring). Justice Kennedy noted that elected judges "have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity." *Id.* at 796, 122 S.Ct. 2528. We think it beyond doubt that states have a compelling interest in developing, and indeed are required by the Fourteenth Amendment to develop, these independent-minded and faithful jurists. *See Caperton v. A.T. Massey Coal Co., Inc.*, --- U.S. ----, 129 S.Ct. 2252, 2259, 173 L.Ed.2d 1208 (2009); *In re Murchison*, 349 U.S. 133, 136, 75

S.Ct. 623, 99 L.Ed. 942 (1955). State rules are the means of their development. *White I*, 536 U.S. at 794, 122 S.Ct. 2528 (Kennedy, J., concurring).

But *White I* makes clear that there are boundaries to the state's regulation of judicial elections. On remand, the Eighth Circuit, adopting the Supreme Court's strict scrutiny approach from *White I*, invalidated Minnesota's ban on partisan activities by judges and the portion of Minnesota's ban on direct solicitation of contributions that prohibited judges from signing fundraising letters or speaking to large groups of potential donors at fundraisers. *Republican Party of Minnesota v. White* (*White II*), 416 F.3d 738, 754, 765-66 (8th Cir.2005) (en banc). Siefert relies heavily on these cases to challenge Wisconsin's code of judicial conduct, which contains provisions that are similar but not identical to those at issue in *White II*.

The Commission relies on two government employment cases, *U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) and *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), to argue that a less stringent standard applies. *Letter Carriers* upheld the constitutionality of Section 9(a) of the Hatch Act, which prohibited federal employees from taking "an active part in political management or in political campaigns." *Garcetti* dismissed a § 1983 claim brought by a deputy district attorney who claimed that his employer, a county, took adverse employment action against him after he wrote a memorandum in which he recommended dismissal of a criminal case based on government misconduct, and that this action amounted

to retaliation for exercising his First Amendment right to free speech. Both of these cases in turn relied on the deferential standard of review articulated in *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), which balances the public employee's right to speak out on matters of public concern against the government's interest in "promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. 1731. In *White I*, the Supreme Court reserved the question of whether this line of cases could justify restrictions on the speech "of judges because they are judges." 536 U.S. at 796, 122 S.Ct. 2528 (Kennedy, J., concurring) ("Whether the rationale of *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, and *Connick v. Myers* could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here." (internal citations omitted)).

The Commission is correct that, ordinarily, governmental entities have some leeway to proscribe certain categories of speech among citizens to promote the efficient performance of governmental functions. *See Citizens United v. Fed. Election Comm'n*, --- U.S. ----, 130 S.Ct. 876, 899, ---L.Ed.2d ---- (2010) (collecting cases). "[T]here are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Id.* The First Amendment allows, for instance, certain prohibitions on students' use of vulgar terms at school, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92

L.Ed.2d 549 (1986), state employees' speech about working conditions, *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), prisoners' union-organizing activity, *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 131-32, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977), military members' dissent, *Parker v. Levy*, 417 U.S. 733, 758, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), federal employees' political activity, *Letter Carriers*, 413 U.S. at 564, 93 S.Ct. 2880, state employees' political activity, *Broadrick v. Oklahoma*, 413 U.S. 601, 616, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), and public school teachers' speech, *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. But *White I* is clear that in the context of elections, judges are free to communicate their ideas to voters. Much of our discussion involves our attempt to harmonize these two strains of First Amendment law.

A. SCR 60.06(2)(b)1: Party Membership

SCR 60.06(2)(b)1 states that "No judge or candidate for judicial office or judge-elect may ... [b]e a member of any political party." We think this rule falls squarely within the ambit of the Supreme Court's analysis in *White I*. Just as in White I, the party affiliation ban forbids "speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms'-speech about the qualifications of candidates for public office." *White I*, 536 U.S. at 774, 122 S.Ct. 2528. We agree with Judge Siefert that the partisan affiliation ban acts to prohibit his speech on both his political views and his qualifications for office. Therefore, the clause is a content-based restriction on speech subject to strict

scrutiny. *Id.*; *United States. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

To survive strict scrutiny, SCR 60.06(2)(b) 1 must be narrowly tailored to serve a compelling state interest. *White I*, 536 U.S. at 774-75, 122 S.Ct. 2528. To show that a restriction on speech is narrowly tailored, the state must show that it "does not 'unnecessarily circumscrib[e] protected expression.' " *Id.* at 775, 122 S.Ct. 2528 (*citing Brown v. Hartlage*, 456 U.S. 45, 54, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982)).

The Commission argues that the ban is necessary to preserve both "impartiality," defined as the "absence of bias or prejudice in favor of, or against, particular parties, or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge," SCR 60.01(7m), and the appearance of impartiality.[2]

In *White I*, the Supreme Court cautioned against vague invocations of "impartiality." 536 U.S. at 775, 122 S.Ct. 2528. Insofar as impartiality refers to "the lack of bias for or against either party to the proceeding," it is a compelling state interest. *Id.* (emphasis in original). This is consistent with the constitutional

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[2]The Commission also argues that "nothing in the Constitution requires Wisconsin to establish a partisan judiciary." However, this is not a case about whether partisan affiliation will appear on the ballot, whether parties will play a formal role in nominating judicial candidates for the general election, or any of the other mechanics of the electoral process.

guarantee of due process, which requires recusal in cases where there is a strong probability of "actual bias." *See, e.g., Caperton*, 129 S.Ct. at 2265 (holding that due process required a justice of the West Virginia Supreme Court of Appeals to recuse himself from a case involving a company whose president spent approximately $3 million to elect the justice while the company's appeal was pending). On the other hand, the *White I* Court squarely rejected the argument that a state has a compelling interest in guaranteeing that judges do not have a "preconception in favor of or against a particular legal view." 536 U.S. at 777, 122 S.Ct. 2528 (emphasis in original). We not only allow, but expect, judges to have preconceived views on legal issues. *See Laird v. Tatum*, 409 U.S. 824, 835, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) (mem. of Rehnquist, J.) ("Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."). Finally, the *White I* Court left open the possibility that "openmindedness"—the willingness to consider opposing views and remain open to persuasion—is a compelling state interest. 536 U.S. at 778, 122 S.Ct. 2528. Because the Court found that the canon at issue did not serve the interest of open-mindedness, it did not decide whether such an interest was in fact compelling. *Id.*

The crux of the state's concern here seems to be that a judge who publicly affiliates with a political party has indicated that he is more inclined toward that party's stance on the variety of legal issues on which that party has a position. But that is the purported compelling state interest that *White I* squarely

rejected. 536 U.S. at 777-78, 122 S.Ct. 2528. The state does not have a compelling interest in preventing candidates from announcing their views on legal or political issues, let alone prohibiting them from announcing those views by proxy.[3] Nor can casting the argument in terms of the "appearance of bias" save it-because "avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either." *Id.* at 778, 122 S.Ct. 2528.

The Commission also argues that the ban on party affiliation is designed to prevent bias for or against parties to a particular case, or the appearance of that bias. While this interest was certainly recognized in

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[3]Wisconsin's politics, like our nation's, are dominated by two large parties which are by no means ideologically homogenous. Even on the most polarizing issues, party membership is a significantly less accurate proxy for a candidate's views on contested issues than membership in special interest or advocacy groups, which the Wisconsin Code of Judicial Conduct does not expressly prohibit. Relying on an advisory opinion issued by the Commission, the defendants argue that the Code prohibits judges and judicial candidates from taking a leadership role in groups such as the Sierra Club or Mothers Against Drunk Driving, which advocate "social goals through litigation and legislative action." Regardless of whether Wisconsin courts eventually adopt the Commission's interpretation of the Code, the flat ban in SCR 60.06(2)(b) 1 treats party membership more harshly than any other affiliation.

White I, this rule is not tailored to it.[4] Arguably, party membership is an association that could call into question the impartiality of a judge when sitting on a case involving that party, or perhaps that party's main rival. *But see White II*, 416 F.3d at 755 ("[T]he fact that the matter comes before a judge who is associated with the Republican or Democratic Party would not implicate concerns of bias for or against that party unless the judge were in some way involved in the case beyond simply having an 'R' or 'D' ... after his or her name.") However, nothing in the record suggests that political parties themselves are such frequent litigants that it would be unworkable for a judge who chooses to affiliate with a political party to recuse himself when necessary.

The Commission attacks the practicality of recusal by arguing that a judge who declared a partisan affiliation would have to recuse himself in every case where a party member was a litigant, or where the political party was supporting a particular outcome, making recusal impractical. But this significantly overstates the likelihood of bias toward particular litigants. Membership in a political party is not the same as membership in a smaller, more cohesive organization. Furthermore, mere membership does not connote the type of intricate relationship with party politics that would create the appearance of bias. Without some specific, individualized relationship, the

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[4]The Commission does not articulate an argument that SCR 60.06(2)(b)1 furthers impartiality in the sense of open-mindedness, so we need not decide to what extent, if any, this interest is compelling.

affiliation between a judge who is a member of a political party and other members of that political party is simply too diffuse to make it reasonable to assume that the judge will exhibit bias in favor of his fellow party members. Indeed, twelve states employ partisan elections with respect to at least some judgeships. *See* American Judicature Society, *Methods of Judicial Selection*, http:// www. judicial selection. us/ judicialselection/methods/selection_dof_ judges.cfm?state= (last visited June 9, 2010) (identifying Alabama, Illinois, Indiana, Kansas, Louisiana, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas and West Virginia as states that employ partisan judicial elections). There is no evidence to suggest that these states have faced an unworkable number of recusals as a result of their partisan judicial elections, nor that their partisan system of elections works a denial of due process. *Cf. White I*, 536 U.S. at 776, 122 S.Ct. 2528 (noting that due process requires an "impartial" judge in the sense of a judge lacking a bias for or against either party to a proceeding). In short, defendants have failed to show why recusal, which does not restrict speech, is an unworkable alternative to Wisconsin's ban on judges and judicial candidates announcing a party affiliation.

B. SCR 60.06(2)(b)4: Endorsement of Partisan Candidates

SCR 60.06(2)(b)4 prohibits judges and judicial candidates from "[p]ublicly endors[ing] or speak[ing] on behalf" of any partisan candidate or platform. Judge Siefert argues that, like the choice to identify as a member of the Democratic Party, the choice to endorse

another candidate is simply a means of expressing his political views. We disagree. An endorsement is a different form of speech that serves a purpose distinct from the speech at issue in *White I* and in the party identification rule discussed above. Accordingly, we believe that it should be subject to a distinct analysis. In keeping with a long line of Supreme Court precedent determining the rights of government employees going back to at least *Ex Parte Curtis*, 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882), a balancing approach, not strict scrutiny, is the appropriate method of evaluating the endorsement rule.

While the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office," *Citizens United*, 130 S.Ct. at 898 (*citing Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (internal quotation omitted)); *see also White I*, 536 U.S. at 774, 122 S.Ct. 2528 (noting that "speech about the qualifications of candidates for public office" is "at the core of our First Amendment freedoms"), a public endorsement does not fit neatly in that category. Endorsements are not simply a mode of announcing a judge's views on an issue, or a shorthand for that view. In fact, the American Bar Association model code from which the rule is derived justifies the restriction on endorsement based on the danger of "abusing the prestige of judicial office to advance the interests of others." Model Code of Judicial Conduct R. 4.1 cmt. [4] (2007). The Commission identifies its interest in the rule as an attempt to preserve the appearance of impartiality in the judiciary. Appellant's Br. at 36.

While an interest in the impartiality and perceived impartiality of the judiciary does not justify forbidding judges from identifying as members of political parties, a public endorsement is not the same type of campaign speech targeted by the impermissible rule against party affiliation in this case or the impermissible rule against talking about legal issues the Supreme Court struck down in *White I*. As Judge Siefert notes, "[e]ndorsements primarily benefit the endorsee, not the endorser" and endorsements may be exchanged between political actors on a quid pro quo basis. Appellee's Br. at 37 & n. 11. This amounts to a concession that offering an endorsement is less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as political powerbroker.

This distance between an endorsement and speech about a judge's own campaign justifies a more deferential approach to government prohibition of these endorsements. *See Letter Carriers*, 413 U.S. at 556, 93 S.Ct. 2880; *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 99, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *see also Biller v. U.S. Merit Sys. Prot. Bd.*, 863 F.2d 1079, 1089 (2d Cir.1988) (noting that the Supreme Court has drawn a careful line between "partisan political activities" and "mere expressions of views"). When judges are speaking as judges, and trading on the prestige of their office to advance other political ends, a state has an obligation to regulate their behavior. We thus see a dividing line between the party affiliation rule, which impermissibly bars protected speech about the judge's own campaign, and the public endorsement rule, which

addresses a judge's entry into the political arena on behalf of his partisan comrades. *See Citizens United*, 130 S.Ct. at 899 (noting that while political speech restrictions are subject to strict scrutiny, "a narrow class of speech restrictions" are constitutionally permissible if "based on an interest in allowing governmental entities to perform their functions."). We note that *Citizens United*, even as it broadly prohibited restrictions on "political speech," reconfirmed the validity of the *Letter Carriers* line of cases, which specifically targeted political activity by government employees. Id. And we reiterate that the Supreme Court's holding in *White I* does not necessarily forbid any regulation of a judge's speech. In fact, Justice Kennedy's concurrence indicates just the opposite. Furthermore, unlike restrictions designed, for example, to regulate federal employees' political activity, restrictions on judicial speech may, in some circumstances, be required by the Due Process Clause. This provides a state with a sufficient basis for restricting certain suspect categories of judicial speech, even political speech. The only question is whether a ban on public endorsements serves this state interest.

Judge Siefert argues that judges are different from "employees" because they are more akin to legislative actors who are "ultimately accountable to the voters." *See Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir.2007). However, this conception of a judge's role is improperly limited. The Hatch Act, as considered in Letter Carriers, was not confined to low-level bureaucrats, but covered the entire executive branch of the federal government, with specific exemptions for the President, Vice President, and "specified officials in

policy-making positions." *Letter Carriers*, 413 U.S. at 561, 93 S.Ct. 2880. While Wisconsin judges receive job evaluations from the voting public, they are employed in the essential day-to-day task of operating a judicial system that must not only be fair and impartial, but must also appear to the public to be fair and impartial. To the extent that Wisconsin chooses to restrict those employed to perform important judicial functions from being in the business of trading political endorsements, important due process interests are served.

Furthermore, while *Garcetti*, *Connick*, *Letter Carriers*, and *Pickering* all concern public employees, the ability of the government to regulate the speech of the employees in those cases is not solely dependent on its authority as an employer. *See Connick*, 461 U.S. at 143-44, 103 S.Ct. 1684 (tracing the development of the law in this area). Instead, by the time it decided *Pickering*, the Supreme Court had recognized that the doctrine that the government was allowed to subject its employees "to any conditions, regardless of how unreasonable" had been "uniformly rejected." *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731 (citation omitted). "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*; *see also Mitchell*, 330 U.S. at 96, 67 S.Ct. 556 ("Again this

Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of the government."). The rationale behind government restriction identified in *Pickering*, therefore, is related both to the government's power as an employer and its duty to promote the efficiency of the public services it performs. Here, we emphasize again, we are not concerned merely with the efficiency of those services, but that the work of the judiciary conforms with the due process requirements of the Constitution; this tips the balance even more firmly in favor of the government regulation.

The observation that elected judges are "ultimately accountable to the voters" seems irrelevant to the due process issue. A judge must also be accountable to her responsibilities under the Fourteenth Amendment. It is small comfort for a litigant who takes her case to state court to know that while her trial was unfair, the judge would eventually lose an election, especially if that litigant were unable to muster the resources to combat a well-financed, corrupt judge around election time. As Justice Kennedy pointed out in his concurrence in *White I*, state rules fill the gap between elections in order to develop the fair jurists to whom each litigant is entitled. *White I*, 536 U.S. at 794, 122 S.Ct. 2528 (Kennedy, J., concurring).

So, as in *Pickering*, we have to find the balance between the state's interest and the judge's. Under the *Pickering* approach, narrow tailoring is not the requirement; the fit between state interest and regulation need not be so exact. Instead, the state's interest must

be weighed against the employee's interest in speaking. *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731; *Bridges v. Gilbert*, 557 F.3d 541, 549 (7th Cir.2009). And the state's interest in the endorsement regulation is a weighty one. Due process requires both fairness and the appearance of fairness in the tribunal. "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136, 75 S.Ct. 623 (*citing Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954)). The Commission's concern is that judges who "publicly endorse or speak on behalf of [a party's] candidates or platforms" undermine this appearance of impartiality.

At the same time, the constitutional protection in a political endorsement is tempered by the limited communicative value of such an endorsement. Judge Siefert concedes that endorsements may be less about communicating one's qualifications for office than bolstering another politician's chances for office. Appellee's Br. at 37 & n. 11. While White I teaches us that a judge who takes no side on legal issues is not desirable, a judge who takes no part in political machinations is.

The Conference of Chief Justices, as amicus, points to the same quid pro quo concerns conceded by Judge Siefert to justify the endorsement ban. "Without this rule, judicial candidates and judges-elect could elicit promises from elected officials, including local prosecutors and attorneys general, in exchange for their endorsement." Br. of Conf. of Chief Justices, amicus, at 23. The Commission justifies its interest in the ban based on the danger that parties whom the judge has endorsed may appear in the judge's court, and argues that the risk of bias is not mitigated by the remedy of

recusal, due to both the volume of litigation involving the government in Wisconsin and the number of small circuit courts in Wisconsin, where recusal would be impracticable. Both the Commission's and the Chief Justices' concerns are valid. Any suggestion that the rule should only forbid Judge Siefert from making endorsements while identifying himself as "Judge" is dubious (he would be prohibited from using his title anyway by SCR 60.03(2)); the Commission is entitled to believe that simply removing the honorific "judge" will not conceal Siefert's true identity from the public.

Judge Siefert, arguing for a strict scrutiny standard, suggests that the availability of recusal, a less restrictive alternative to the ban on endorsements, dooms the prohibition. The example Judge Siefert uses to dispute the Commission's argument that recusal is too onerous for some of its courts—his endorsement of President Obama—is a particularly good example of why strict scrutiny is the inappropriate inquiry. The value of that endorsement to the President would be directly congruent to Judge Siefert's status in the community, the publicity his endorsement would engender, and the narrowness of the margin in public support for the President. While all of these factors enhance the value of the endorsement, they similarly enhance its problematic nature. A local judge who tips the outcome of a close election in a politician's favor would necessarily be a powerful political actor, and thus call into question the impartiality of the court. Conversely, if Judge Siefert's public endorsement carried no weight, why preserve his right to make this public endorsement by jeopardizing the efficiency of Wisconsin's courts? *See Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908 ("Application of the overbreadth doctrine in

this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort."). Once we accept that public endorsements are not the type of speech contemplated in *White I*, our task is to balance the value of the rule against the value of the communication. The concerns the Commission and its amici articulated also speak to a broader concern that freely traded public endorsements have the potential to put judges at the fulcrum of local party politics, blessing and disposing of candidates' political futures. Given that Wisconsin's interest in preventing its judges' participation in politics unrelated to their campaigns is justified based on its obligations *987 under the Due Process Clause, as well on its obligation to prevent the appearance of bias from creeping into its judiciary, and that the endorsement restriction does not infringe on a judge's ability to inform the electorate of his qualifications and beliefs, the regulation is permissible.

We note that the rule only bans endorsements in partisan elections. Wisconsin also holds nonpartisan elections for judges, as well as the state superintendent of public education, county board members, county executives, and municipal and school district officers. Wis. Blue Book 884; *see* Wis. Stat. §§ 5.58, 5.60. According to the text of the rule ("No judge or candidate for judicial office ... may publicly endorse or speak on behalf of [a political party's] candidates or platforms"), endorsements in these nonpartisan elections may be freely given. Were we to consider this provision under strict scrutiny, this underinclusiveness could be fatal to the rule's constitutionality.

But, because we are applying a balancing test, the

question we ask is whether the exception for nonpartisan elections so weakens the ban (and therefore the state's asserted interest in enforcing it) that the scales tip in favor of the plaintiff's right to speak. *See SEIU, Local 3 v. Municipality of Mt. Lebanon*, 446 F.3d 419, 425 (3d Cir.2006) ("[T]o the extent that the [regulation] is not tailored to the [state's] stated interest, there is a commensurate reduction in the [state's] interest in its enforcement." (quotation omitted)). We think it does not for two reasons.

First, the Commission justifies the ban based on the onerous nature of recusal in the case where a judge endorses a prosecutor or sheriff who frequently appears in front of the court. None of the nonpartisan officials appear as frequently before the court as law enforcement officials. Of these nonpartisan officials, only judges are necessarily lawyers, and the frequency with which a private practitioner appears before a court pales in comparison with prosecutors and sheriffs who are involved in litigation nearly every day. Even nonpartisan candidates that may come before the court as part of a suit against their institution (for instance, school board members) will not appear as frequently before the court as the partisan law enforcement officials that the ban reaches.

Second, the difficulty of recusal is but one factor in favor of the ban; the other is Wisconsin's interest in preventing judges from becoming party bosses or power-brokers. Wisconsin has a justified interest in having its judges act and appear judicial rather than as political authorities. This interest is directly implicated by endorsements in partisan elections and much less so, if at all, in nonpartisan elections. In a nonparti-

san election, an endorsement connotes the quality of one candidate among several. In a partisan election, an endorsement can still mean an assessment of the quality of the endorsed candidate, but it also carries implications that the endorsement is given because of party affiliation; in other words, it suggests that the political party of the endorsing judge is behind the candidate. In that sense, the judge becomes a spokesperson for the party. The state's interest in preventing partisan endorsements, then, is appropriately given more weight than nonpartisan endorsements.

Our treatment of the endorsement prohibition is based on the claims that Judge Siefert, an incumbent, brings. This is not the appropriate case to address the issue of regulations for judicial candidates who are not judges. Their potential role on a court or the impact that such endorsements could have on a judicial election as a whole may justify the type of regulation we have here, but that is for another day. *United States v. Wurzbach*, 280 U.S. 396, 399, 50 S.Ct. 167, 74 L.Ed. 508 (1930) ("[I]f there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by some one whom it concerns."). Wisconsin has an interest in regulating the non-campaign political activities of its judges, and prohibiting public endorsements serves this interest.

C. SCR 60.06(4): Personal Solicitation

The final portion of the Wisconsin Judicial Code of Conduct at issue here is the ban on the personal solicitation of contributions by judges or judicial candidates. SCR 60.06(4) allows a judge to set up a finance committee to raise campaign contributions, serve on that committee, and appear at fundraising

events. The canon prohibits judges from directly soliciting or accepting contributions. Finally, judges are admonished to avoid "direct involvement" in their campaign's fundraising efforts, although no particular level of involvement is expressly forbidden.

At heart, the solicitation ban is a campaign finance regulation. As such, it is reviewed under the framework set forth in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). See also *Stretton v. Disciplinary Bd. of Supreme Ct. of Penn.*, 944 F.2d 137, 145-46 (3d Cir.1991) (a pre- *White I* case upholding Pennsylvania's personal solicitation ban under a deferential standard). In *Buckley*, the Supreme Court recognized a compelling state interest in preventing corruption or the appearance of corruption in elections through some campaign finance regulation. *Id.* at 26-27, 96 S.Ct. 612; *see also Citizens United*, 130 S.Ct. at 908. The Court reasoned that restrictions on raising funds were typically less burdensome to speech than restrictions on spending funds, and thus created a two-tiered scheme of review for campaign finance regulation. *Buckley*, 424 U.S. at 20-21, 96 S.Ct. 612. Under *Buckley*, restrictions on spending by candidates and parties is reviewed with strict scrutiny, while restrictions on contributions are reviewed under less rigorous "closely drawn" scrutiny. *Id.* at 25, 96 S.Ct. 612. We note that *Citizens United*, rather than overruling *Buckley*, noted and reinforced the distinction between independent expenditures on behalf of candidates and direct contributions to candidates. *Citizens United*, 130 S.Ct. at 909-11; *see also* Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 Harv. J.L. & Pub. Pol'y 283, 290-92

(2010). Since we are dealing with regulation of campaign contributions, we therefore proceed with the analysis under *Buckley*.

Because the direct solicitation ban does not restrict the amount or manner in which a judicial candidate can spend money on his or her campaign, we apply closely drawn scrutiny. This is consistent with the approach the Supreme Court took in analyzing the various solicitation bans in the Bipartisan Campaign Finance Reform Act. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136-38 & n. 40, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), *overruled in part on other grounds by Citizens United*, 130 S.Ct. at 913; *see also id.* at 177, 181-82, 124 S.Ct. 619. *But see id.* at 314, 124 S.Ct. 619 (Kennedy, J., concurring in part in the judgment and dissenting in part) (applying strict scrutiny to solicitation ban); *White II*, 416 F.3d at 765-66 (applying strict scrutiny to solicitation ban without discussion of *McConnell*). We note, however, that even if strict scrutiny applied, a solicitation ban may still survive if it is narrowly tailored to prevent corruption or the appearance of corruption. *See McConnell*, 540 U.S. at 314, 124 S.Ct. 619 (Kennedy, J., concurring in part in the judgment and dissenting in part) (concluding that the Federal Election Campaign Act § 323(e), which prohibits federal candidates from soliciting soft-money contributions, survives strict scrutiny); *White II*, 416 F.3d at 765-66 (suggesting that portion of Minnesota's solicitation ban that prohibits judges from knowing the identity of contributors or non-contributors would survive strict scrutiny). We believe it survives under either standard. *But see Weaver v. Bonner*, 309 F.3d 1312, 1322-23 (11th

Cir.2002) (striking down personal solicitation ban after applying strict scrutiny).

The Commission suggests that this ban ensures that "no person feel directly or indirectly coerced by the presence of judges to contribute funds to judicial campaigns," Order No. 00-07 at 11 (Abrahamson, C.J., concurring), and eliminates the potential bias or appearance of bias that would accompany lawyers who frequently appear before a judge being personally solicited for campaign contributions. Siefert argues that the solicitation ban does not serve the impartiality interest as defined in *White I* and that the interest advanced by the state in protecting potential donors from coercion is not one that we should recognize as compelling.

Wisconsin's personal solicitation ban serves the anticorruption rationale articulated in *Buckley* and acts to preserve judicial impartiality. [5] A contribution given directly to a judge, in response to a judge's personal solicitation of that contribution, carries with it both a greater potential for a quid pro quo and a greater appearance of a quid pro quo than a contribution given to the judge's campaign committee at the request of someone other than the judge, or in response to a mass mailing sent above the judge's signature. In

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[5]These two interests are closely linked and may be best understood as different ways of stating the same concern. *Cf. White II*, 416 F.3d at 769 (Gibson, J., dissenting) (" 'Open-mindedness,' in Justice Scalia's terminology, is in reality simply a facet of the anti-corruption interest that was recognized in *Buckley v. Valeo* and subsequent campaign finance cases." (citations omitted)).

White II, for example, the Eighth Circuit recognized that a ban prohibiting "candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case," 416 F.3d at 765, but concluded that prohibiting a candidate from personally signing a solicitation letter or making a blanket address to a large group does not advance that interest, id. at 765-66. Similarly, while we decline to recognize here a compelling state interest in protecting potential contributors from feeling "coerced," we note that the perceived coerciveness of direct solicitations is closely related to their potential impact on impartiality.[6] A direct solicitation closely links the quid-avoiding the judge's future disfavor-to the quo-the contribution. We do not mean to suggest that judges who directly solicit contributions are necessarily behaving inappropriately,

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[6]Because we do not adopt the "coercion" rationale to support SCR 60.06(4), we need not reach Siefert's argument that the direct solicitation ban is significantly underinclusive because it does not apply to candidates for legislative office. In any event, this argument misapprehends the respective roles of legislators and judges. Legislators are not expected to be impartial; indeed, they are elected to advance the policies advocated by particular political parties, interest groups, or individuals. Judges, on the other hand, must be impartial toward the parties and lawyers who appear before them. In addition, legislators can only act with the support of their colleagues. Judges-particularly trial court judges-exercise wide and largely unreviewable discretion over discrete cases involving specific parties and lawyers.

but the appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means.

The question remains whether the solicitation ban hews closely enough to the anti-corruption rationale that purportedly justifies it. Wisconsin allows judges to serve on their own finance committees, and while it directs them to avoid involvement with the committee's fundraising efforts, it does not specifically prohibit them from reviewing lists of contributors. *Cf. White II*, 416 F.3d at 766 (concluding that where judicial canon prohibited judges from knowing the identities of contributors and non-contributors, additional restrictions on blanket solicitations to large groups were unconstitutional). Wisconsin also allows judges to appear at their own fundraising events, where they will come into contact with people who they will likely presume are contributors. Finally, the ban reaches solicitations that do not implicate the risk of a quid pro quo, such as solicitations directed at family members.

We conclude that the solicitation ban is drawn closely enough to the state's interest in preserving impartiality and preventing corruption to be constitutional. The fact that a judge might become aware of who has or has not contributed to his campaign does not fatally undercut the state's interest in the ban. As discussed earlier, the personal solicitation itself presents the greatest danger to impartiality and its appearance. Like SCR 60.06(4), the solicitation ban at issue in *McConnell* did not prohibit officeholders from becoming aware of soft-money contributions and contained an

exception for fundraising events. *See* 2 U.S.C. § 441i(e) (codifying FECA § 323(e)). Finally, to the extent that the ban affects, at the margins, some solicitations that do not pose a risk to impartiality, that impact is not fatal to the ban. Just as the state may enact a contribution limit, rather than ask of each individual contribution whether it poses the risk of corruption, the state may enact a ban on direct solicitations, a ban tailored to the specific behavior that poses the greatest risk. *Cf. Buckley*, 424 U.S. at 26-28, 96 S.Ct. 612. Moreover, the ban's effect on innocuous contributions is small because the judge's campaign committee remains free to solicit those individuals. And unlike the partisan affiliation and endorsement bans, there is no reasonable, less restrictive means available here. It is an unfortunate reality of judicial elections that judicial campaigns are often largely funded by lawyers, many of whom will appear before the candidate who wins. It would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution. Because the ban on direct solicitation of contributions by judicial candidates prevents corruption and preserves impartiality without impairing more speech than is necessary, we reverse the district court's decision on SCR 60.06(4).

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment in favor of Siefert with respect to the party affiliation ban, SCR 60.06(2)(b) 1, but REVERSE the district court's judgment with respect to the public endorsement and personal solicitation bans, SCR 60.06(2)(b)4 and SCR 60.06(4).

ROVNER, Circuit Judge, dissenting in part.

Protecting judicial integrity is a government interest of highest magnitude, as is protecting the rights guaranteed by the First Amendment. Reconciling these two competing interests is no small feat, and when evaluating the party membership restrictions in Section II.A and the personal solicitation restriction in Section II.C, I believe the majority successfully navigates the competing concerns. As for the ban on endorsements of partisan candidates, the majority and I begin at the same starting point-with the notion that endorsements of candidates in political elections are troubling and have the potential to compromise judicial impartiality. I part ways with the majority, however, where it applies the balancing test from *Pickering* and *Connick* to the endorsement ban. *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Because I believe this is the wrong test to apply, I respectfully dissent.

Laws and regulations that restrict speech on the basis of content are subject to the high hurdle of the strict scrutiny test. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). Such laws are "presumptively invalid, and the Government bears the burden to rebut that presumption." *United States v. Stevens*, --- U.S. ----, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010) (internal citations omitted); *Playboy Entm't Group*, 529 U.S. at 813, 817, 120 S.Ct. 1878. In addition, speech about the qualifications of candidates for public office

is at the core of First Amendment freedoms and is thus also strictly scrutinized. *Republican Party of Minn. v. White*, 536 U.S. 765, 774, 781, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989). The law presumes that these intrusions on First Amendment rights are invalid and shifts the burden of proof to the government to demonstrate that these regulations are narrowly tailored to serve a compelling government interest. *Stevens*, 130 S.Ct. at 1584; *Eu*, 489 U.S. at 222, 109 S.Ct. 1013. There could be no clearer example of a restriction that is both content-based and that burdens speech regarding qualifications for office than the one at issue here: Wisconsin Supreme Court Rule 60.06(2)(b)4 states that no judge or candidate for judicial office may "[p]ublicly endorse or speak on behalf of [a party's] candidates or platforms." SCR 60.06(2)(b)4. The majority concedes that under a strict scrutiny analysis, the regulation at issue here would fail. *Supra* at 24a. Rather than reach that unpalatable result, however, it has manufactured a new balancing test not heretofore applied to the First Amendment rights of elected judges.

It is true, of course, that some forms of speech fall outside the protections of the First Amendment, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See Stevens*, 130 S.Ct. at 1584. And in the case of public employees, the Supreme Court has relaxed the scrutiny it applies to regulation of government employee speech, holding that a public employee's right to speak on matters of public concern must be balanced against the govern-

ment's need for efficient operation of government functions. *Garcetti v. Ceballos*, 547 U.S. 410, 418-19, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *Connick*, 461 U.S. at 142, 103 S.Ct. 1684; *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. Neither this court nor the Supreme Court, however, has ever held that these decisions limiting the speech of public employees can be applied to elected officials' speech, including the speech of elected judges.

In the seminal case on free speech and judicial codes of conduct, the Supreme Court applied strict scrutiny in evaluating the challenged provisions of Minnesota's Code of Judicial Conduct. *White*, 536 U.S. at 774, 122 S.Ct. 2528. Although the White decision considered the rights of candidates seeking judicial office as opposed to those already holding office, the language of the decision reflects two important principles that apply to the case before us today-the Court's recognition that political speech is highly protected and that content-based restrictions must be viewed most skeptically. *Id.* The court in White stated,

> the notion that the special context of electioneering justifies an abridgement of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.

Id. at 781, 122 S.Ct. 2528 (internal citations omitted) (emphasis in original).

In *White*, it was undisputed and uncontroversial that the court should apply strict scrutiny in evaluating the content-based restrictions of the canons of judicial conduct. *Id.* at 774, 122 S.Ct. 2528. Even the two dissenting opinions, which vigorously defended the particular speech restrictions on judges, did so while applying strict scrutiny. *See White*, 536 U.S. at 800, 122 S.Ct. 2528 (Stevens, J., dissenting) ("Minnesota has a compelling interest in sanctioning such statements."); *Id.* at 817, 122 S.Ct. 2528 (Ginsburg, J., dissenting) ("In addition to protecting litigants' due process rights, the parties in this case further agree, the pledges or promises clause advances another compelling state interest: preserving the public's confidence in the integrity and impartiality of its judiciary."). In short, both the majority and dissent in White applied strict scrutiny to a content-based speech prohibition for judicial candidates.[1] Nevertheless, as

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[1]In his concurrence, Justice Kennedy noted that he would go further and hold that "content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further

Justice Kennedy noted in his concurrence, the *White* decision left open the question as to whether "the rationale of Pickering and Connick could be extended to allow a general speech restriction on sitting judges-regardless of whether they are campaigning-in order to promote the efficient administration of justice ...." *White*, 536 U.S. at 796, 122 S.Ct. 2528 (internal citations omitted).

Although the *White* court left the question unanswered, that opinion and others provide compelling support for the proposition that strict scrutiny is the proper test for evaluating restraints on an elected judge's speech. The Supreme Court has long found the speech of elected officials to be as protected as that of ordinary citizens. In *Bond*, the Supreme Court held that the State of Georgia could not exclude a state representative from membership in the legislature based on his criticism of the Vietnam War. *Bond v. Floyd*, 385 U.S. 116, 133, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). The Court specifically noted that the interest of the public in hearing all sides of a public issue is advanced by extending the same First Amendment protections to legislators as to ordinary citizens. *Id.* at 136, 87 S.Ct. 339. The Court later held the same for a sheriff who questioned the motivations of a judge's charge to a grand jury. The Court reasoned that "the role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public impor-

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inquiry is necessary to reject the State's argument that the statute should be upheld." *White*, 536 U.S. at 792-93, 122 S.Ct. 2528 (Kennedy, J., concurring).

tance." *Wood v. Georgia*, 370 U.S. 375, 395, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962). Forty years later, a majority of the Supreme Court repeated this same statement in evaluating the restrictions imposed by a canon of judicial conduct. *White*, 536 U.S. at 781-82, 122 S.Ct. 2528. After reviewing *White*, and its analyses of these earlier cases, the Fifth Circuit concluded that strict scrutiny was the appropriate test for evaluating a state's interest in suppressing a sitting judge's speech. *Jenevein v. Willing*, 493 F.3d 551, 557-58 (5th Cir.2007).

In contrast, non-elected employees, like those covered by the Hatch Act, are subject to a test which balances the interests of the employee as a citizen, in commenting upon matters of public concern, against the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *See U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 561, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). The Hatch Act restricts the speech of government employees by prohibiting them from taking an active part in political management or political campaigns, but notably exempts the two elected executive branch employees, the president and vice president, from coverage. 5 U.S.C. § 7322(1); *See also Letter Carriers*, 413 U.S. at 561, 93 S.Ct. 2880. In sum, no Supreme Court decision or Seventh Circuit case has applied a balancing test to the speech of elected officials.

It would be folly, of course, to ignore the reality that elected judges are different from elected legislators and executives. "Legislative and executive officials act on behalf of the voters who placed them in office;

judges represent the Law." *White*, 536 U.S. at 803, 122 S.Ct. 2528 (Ginsburg, J., dissenting) (internal citations omitted). *See also Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir.1993) ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech.").

This distinction, however, does not warrant abandoning a strict scrutiny analysis of content-based regulations of speech about the political qualifications of candidates for elected office. Content-based regulations are, after all, some of the most reviled by the First Amendment and election speech among the most protected. There is no doubt that the due process rights guaranteed by the Fourteenth Amendment are equally compelling, but we need not abandon well-settled First Amendment jurisprudence and set aside strict scrutiny to protect due process, as the majority claims. Rather, the solution is to apply strict scrutiny but give proper weight to the exceedingly compelling interest the state has in ensuring an impartial and fair judiciary. *See id.* at 228 (noting that the fact that elected judges are different from elected legislators and executive officials bears on the strength of the state's interest in restricting their freedom.). *See also White*, 536 U.S. at 783, 122 S.Ct. 2528 ("we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."). In evaluating a restraint on judge's speech under a strict scrutiny analysis, a court must consider its hefty obligation to provide litigants with a fair adjudicative proceeding by an impartial and disinterested tribu-

nal-a right guaranteed by the Due Process Clause of the Fourteenth Amendment, as well as its obligation to preserve public confidence in the integrity and impartiality of the judiciary. *See White*, 536 U.S. at 813, 817, 122 S.Ct. 2528 (Ginsburg, J., dissenting).

Furthermore, although elected judges are not the same as elected legislators and executives, they are also not entirely like judges appointed for life or for fixed terms-immune from the influence of popular opinion. As Justice Scalia pointed out in *White*, a judge contemplating releasing a notorious terrorist is well aware that she faces the pressure of being voted out of office come the next election cycle. *Id.* at 782, 122 S.Ct. 2528. Thus, in some limited sense, elected judges, for better or for worse, know that they serve at the pleasure of the public. And although a state is free to establish any constitutional system it wishes to populate its benches, states that choose to elect judges have made a particular decision about the role of the public in the selection of judges.

Our federal Constitution, of course, provides for appointment of judges for life. As Justice O'Connor recounted in *White*, the first twenty-nine states did not use elections for selecting judges. *White*, 536 U.S. at 791, 122 S.Ct. 2528 (O'Connor, J., concurring). In the 1830's and 1850's as part of the Jacksonian movement toward greater popular control of public office, many states turned from appointing judges to popular elections. *Id.* Thirty-one states have turned from non-electoral systems to popular elections. *Id.* at 792, 122 S.Ct. 2528. There may be many reasons why a state opts to elect judges, but such a decision reflects, at least in part, a policy decision that to the extent that

judges have any discretion to mold the law-and of course they do-the people should be able to have some say in how that discretion will be used. For example, in the area of sentencing where discretion can be large, the public may choose to elect candidates who are "tough on crime" or who "judge with compassion." The choice to elect judges may also represent an attempt to allow the people to choose among the populace the person they see as most fit to judge, but embedded in this choice is most certainly some consideration about how that candidate understands and would apply the law. The decision to hold judicial elections, therefore, may negatively impact the integrity of the judiciary in ways that are unavoidable, *see White*, 536 U.S. at 782, 122 S.Ct. 2528; *see also id.* at 789, 122 S.Ct. 2528 (O'Connor, J., concurring) (explaining why the very practice of electing judges undermines the interest in an impartial judiciary), but it is, nevertheless, a legitimate choice by a state.

Having made a policy decision allowing the public to shape the bench, a state must permit judges greater leeway to communicate their opinions. Thus, although elected judges are not like other elected officials, they are also not like public employees subject to Pickering-that is, employees who answer only to the government as employer and not to the public at large. As the majority in White pointed out, "if the State chooses to tap the energy and the legitimizing power of the democratic process [in the election of judges], it must accord the participants in that process the First Amendment rights that attach to their roles." *White*, 536 U.S. at 788, 122 S.Ct. 2528. "Opposition [to electing judges] may be well taken (it certainly had the support of the Founders of the Federal Government),

but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about." *Id.* at 787-88, 122 S.Ct. 2528. Endorsements are part of that discussion in much the same way that announcing one's views on the legal issues of the day are-the issue before the court in *White*. We are, after all, often judged by the company we keep. There is much to say about the utility and harm of endorsements, but because my disagreement with the majority is over the level of scrutiny to be applied to the regulation, I need not spill ink evaluating the benefits and harms of endorsements. Most importantly, it is important to note that applying strict scrutiny will not mean that the speech of sitting judges cannot be regulated more restrictively than the speech of other elected officials; it most certainly can. The state, after all, has an exceptionally compelling interest in protecting the integrity of the judiciary and the due process rights of litigants.

In short, I would apply a strict scrutiny test to the announce clause at issue in this case. Whatever the result may be in an ordinary case where a state passes a blanket prohibition on endorsements by sitting judges, the result here is made simple by the fact that Wisconsin allows endorsements for non-partisan but not partisan elections. As even the majority concedes, the under-inclusiveness of the provision is fatal to the rule's constitutionality when applying strict scrutiny. *See supra* at 24a; *see also White*, 536 U.S. at 780, 122 S.Ct. 2528 .

Wisconsin has opted to allow judges to endorse candidates in non-partisan elections. Such endorse-

ments threaten judicial fairness and the appearance of fairness no less than endorsements in partisan elections. Lawyers and judges who lose non-partisan judicial elections, for example, go right back to practicing (and perhaps appearing as litigants) in the same small circuits in Wisconsin in which they ran and were endorsed by sitting judges. A criminal defendant prosecuted by such an endorsed attorney will not question the fairness of his trial any less because the prosecuting attorney ran in a non-partisan rather than a partisan election. And a judge who makes or breaks a non-partisan candidate's career is no less of a power broker than one who endorses a partisan candidate. It may be true that party-affiliated sheriffs and prosecutors appear frequently in courtrooms, but it is also true that frequent litigators, who are the very same lawyers who are most qualified and most likely to run for judge, should they lose, will go right back to litigating before those same judges who endorsed them.

By allowing endorsements in non-partisan elections, Wisconsin has largely eviscerated the force of any asserted concern. A regulation that is so under-inclusive diminishes the credibility of the government's rationale for restricting speech. *White*, 536 U.S. at 780, 122 S.Ct. 2528.

Perhaps the endorsement provision causes us such unease because we expect a judge not to use her office for personal gain-either her own or others'. In fact, Wisconsin Supreme Court Rule 60.03(2) prohibits improper use of the visibility and prestige of the judicial office. Endorsements arguably use the visibility and prestige of the judicial office in an improper manner. Wisconsin, however, has not articulated this

as its interest and indeed cannot, as it allows endorsements in non-partisan races.

Although I disagree with the majority about the proper test to apply, it is likely that under different circumstances our outcome would nevertheless be the same and I would find myself concurring in the result. My dissent stems entirely from the unique situation presented here. Wisconsin has opted to elect judges in popular elections and has further mired those judges in that political process by allowing them to make non-partisan endorsements. Endorsements undermine the integrity of the judiciary regardless of whether they focus on partisan or non-partisan races. Once Wisconsin greased the slope for non-partisan endorsements, it should not have been surprised that partisan endorsements could come sliding after. Wisconsin has failed to demonstrate that its endorsement ban is narrowly tailored to prevent the harm it asserts.

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

JOHN SIEFERT, Plaintiff, vs. JAMES ALEXANDER, *et al.*, Defendants.	Case No. 3:08-CV-126-bbc February 17, 2009 **OPINION AND ORDER**

BARBARA B. CRABB, District Judge.

A commitment to judicial independence and impartiality has long been viewed as one of the cornerstones of the American judiciary. Courts maintain their legitimacy only so long as those who walk through the courthouse doors believe that they are being treated fairly, that is, that the judge is deciding the case on the basis of his or her view of the law and facts and not on the basis of an outside influence or bias.

Just as central to American democracy is the belief in free expression and open government. Under the First Amendment, generally the view is that more

rather than less information advances democratic values and that the government should not be the arbiter of which ideas are true or false, important or unimportant, helpful or harmful. Particularly in the context of popular elections, it is the people who decide through their votes which message resonates.

In the context of judicial elections, questions arise about the compatibility of these two fundamental values. Should a candidate's or judge's speech be limited to prevent him from making statements that could make him appear biased? If so, under what circumstances is such a restriction appropriate? How can the integrity of the judiciary be preserved without unduly inhibiting the conversation between a judicial candidate and the electorate? These difficult questions are at the heart of the dispute between the parties in this case.

Plaintiff John Siefert is an elected Wisconsin circuit court judge in Milwaukee County who would like to state his affiliation with the Democratic Party, endorse partisan candidates for office and personally solicit contributions for his next election campaign, but he fears violating provisions of the Wisconsin Code of Judicial Conduct that prohibit these activities. Rather than violate the provisions and subject himself to discipline, plaintiff filed this suit for declaratory and injunctive relief under 42 U.S.C. § 1983 against the members of the Wisconsin Judicial Commission responsible for enforcing the code, seeking a determination of his right to undertake the prohibited activities. Plaintiff says that the rules violate his right to free speech; defendants say that the rules are necessary to keep judges from being improperly influenced

by partisan considerations, to maintain public confidence in the Wisconsin judiciary and to prevent potential donors from feeling coerced into giving money. The parties' cross motions for summary judgment are now ripe for review. (Wisconsin's attorney general invited the State Bar of Wisconsin to file an amicus brief, but it declined to do so. Dkt. # 47.)

Over the years, many states with elected judges and many bar associations, including the American Bar Association, have addressed what they see as factors working against the goal of maintaining an impartial judiciary. To that end, they have developed canons of judicial conduct, forbidding such activities by candidates for judicial office as announcing their views on disputed legal and political issues, making personal solicitations of funds or endorsements and engaging in partisan activities or even identifying themselves as members of a particular party. In 2002, the United States Supreme Court ruled the first of these restrictions unconstitutional, holding that the First Amendment was violated when judicial candidates were prohibited from announcing their views on disputed issues likely to come before the court. *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002). In 2005, the Court of Appeals for the Eighth Circuit ruled that the First Amendment made unconstitutional bans against direct solicitation and the partisan activities of identifying oneself as a member of a political organization, attending political gatherings or accepting endorsements from a political organization. *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir.2005). These two cases have transformed the legal perspective from which the canons of judicial conduct are viewed.

Wisconsin is one of the states that has worked to maintain a judiciary that is perceived as impartial. Among the canons adopted by the Supreme Court of Wisconsin in pursuit of this goal are three that plaintiff is challenging in this suit. SCR 60.06(2)(b)(1) provides that no judge or judicial candidate may be a member of any political party. SCR 60.06(2)(b)(4) provides that no judge or judicial candidate may publicly endorse or speak on behalf of a political party's candidates or platforms. SCR 60.06(4) provides that a judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions.

Reviewing these canons in light of the Supreme Court's opinion in White (*White I*) and defendants' failure to show that any of the rules challenged by plaintiff is narrowly tailored to promote a compelling state interest, as required under the First Amendment, I must conclude that the rules at issue do not withstand strict scrutiny. This conclusion should not be viewed as denigrating the conscientious efforts made by the state supreme court and many lawyers over many years to draft canons that they believe are necessary to maintain a non-partisan judiciary. It may be that the job is impossible. Once a state decides, as Wisconsin has, that judges are to be democratically elected along with the members of the other two branches of government, the task of legislating nonpartisanship and the appearance of impartiality without violating the First Amendment becomes a thicket of complexity.

From the parties' proposed findings of fact, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff John Siefert has been a judge of the Circuit Court for Milwaukee County since he was first elected in 1999. Defendant James Alexander is the executive director of the Wisconsin Judicial Commission; defendants Ginger Alden, Donald Leo Bach, John Dawson, David Hansher, Gregory Peterson, William Vander Loop, Michael Miller and James Haney are members of the commission.

The commission investigates and prosecutes potential violations of the Wisconsin Code of Judicial Conduct, which regulates the behavior of judges and judicial candidates. In Wisconsin, state court judges are selected through nonpartisan elections, meaning that a judicial candidate is not nominated by a political party and no party affiliation appears next to the candidate's name on the ballot.

A. Plaintiff's Background

Before plaintiff was a circuit court judge, he had been a member of the Democratic Party and participated in a number of partisan activities, including:

- serving as a delegate to the Democratic National Convention;
- twice running as a Democrat for the state legislature;
- twice running as a Democrat for county treasurer; holding that office from 1990 to 1993;
- serving as an alternate elector for President Bill Clinton in 1992.

Plaintiff would like to join the Democratic Party

again, endorse partisan candidates and personally solicit campaign contributions, but he fears that doing so will subject him to discipline for violating the code of judicial conduct. In particular, with respect to becoming a member of the Democratic Party, he would like to list his party membership in response to candidate questionnaires. (He does not seek to have his party affiliation listed on the ballot; such a listing is prohibited by Wis. Stat. §§ 5.58 and 5.60 and is not the subject of this suit.) He believes membership in the Democratic Party would communicate his desire for social justice and peace. He understands that voters may use party affiliation as a "shorthand" for many of his views, but he does not wish to appeal to partisanship as a candidate or as a judge.

With respect to endorsing partisan candidates, plaintiff wanted to endorse Barack Obama in the 2008 presidential election. In the future, plaintiff would like to endorse Jim Doyle for governor of Wisconsin in 2010 and President Obama if he decides to run for reelection in 2012.

With respect to fund raising, plaintiff would like to solicit contributions for his upcoming 2011 campaign and to pay off debts from his past campaigns by making phone calls to potential contributors, signing his name to fund-raising letters and by personally inviting potential donors to fund raising events. He does not challenge the need for a campaign committee to handle the ministerial tasks of fund-raising and take responsibility for the collection and reporting of donations.

B. Historical Background[1]

Since Wisconsin became a state in 1848, the Wisconsin Constitution has required that state court judges be chosen by popular election. Wis. Const. art. VII, §§ 4-6. Political parties made the first supreme court nominations at party conventions, despite concerns by some that "an openly partisan jury would be subject to corrupting influences."

In *In re Booth*, 3 Wis. 1, 54 (1854), the supreme court held by a 2-1 vote, with Justice Samuel Crawford dissenting, that the federal Fugitive Slave Act of 1850 was unconstitutional. Following the court's decision, Wisconsin defied federal efforts to enforce the law. Justice Crawford was defeated for reelection in 1855 largely because of his dissent in Booth rather than any concerns about his legal abilities.

In *Ableman v. Booth*, 21 How. (62 U.S.) 506, 514, 16 L.Ed. 169 (1859), the United States Supreme Court reversed the Wisconsin Supreme Court's 1854 Booth decision. The Wisconsin Supreme Court then voted not to file the United States Supreme Court's decision, with Chief Justice Luther S. Dixon dissenting. *Ableman v. Booth*, 11 Wis. 498, 501 (1859). Although Dixon was a Republican and his legal abilities were

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[1]The facts regarding the history of the Wisconsin judiciary come from defendants' legal historian, Joseph Ranney, who cites a number of sources such as John Bradley Winslow, *The Story of a Great Court* (1912), and Milo M. Quaife, *The Attainment of Statehood* (1928), as well as a number of original documents. Plaintiff does not dispute Ranney's account.

highly respected, the 1860 Republican convention refused to nominate him for reelection because of his dissent. Dixon was nominated by an independent convention and was narrowly reelected.

During the late 1840s and early 1850s, many Wisconsin farmers purchased railroad stock by giving promissory notes secured by mortgages on their land in order to obtain railroad service for their communities. Following a depression in 1857, many railroads went into receivership and financiers to whom they had sold the farmers' promissory notes attempted to foreclose on the mortgages. The Wisconsin legislature enacted a series of laws promoting debtor relief, most of which the Wisconsin Supreme Court declared unconstitutional. During the early 1860s, many farmers and their supporters formed the Grand State League to promote debtor relief. With the league's support, the Democratic Party several times nominated supreme court candidates to oppose sitting justices up for reelection; the opposing candidates ran largely on a platform of debtor relief. No sitting justice was defeated, but the results were often quite close.

An informal tradition developed of preserving a "partisan balance" on the court. In 1878, when the size of the court was expanded from three to five justices, legislative caucuses of both parties arranged to nominate one Democrat and one Republican as consensus candidates for the new seats to achieve balance on the bench.

The last judicial election contest with "overt partisan tones" was held in 1895 when then-Justice John B. Winslow, a Democrat, narrowly won reelection over his Republican opponent. In 1909, the election of

Justice John Barnes created an apparent Democratic majority on the supreme court despite the fact that voters consistently elected Republican governors and legislatures during this time and the Democratic Party was very weak. Little attention was paid to Barnes's party affiliation or to partisan affiliations of the justices, demonstrating "the absolute disappearance of partisan considerations" by that time.

In the late 1800s, the state legislature and the voters began making a number of changes to the nomination and election process of judges and other candidates for office:

• in 1891, the legislature removed the requirement to place party designations on "ballots for school or judicial offices" in municipalities of populations less than 50,000;

• in 1898, the legislature removed the "straight party ticket" option from Wisconsin ballots (this option has since been restored, Wis. Stat. § 5.64(1)(ar)1.a);

• in 1903, the legislature passed a law replacing the caucus system of choosing candidates with open primaries; the voters ratified this decision in 1904;

• in 1911, the legislature allowed nonpartisan nominations to be made in judicial elections.

Finally, in 1913, the legislature passed a law making all judicial elections nonpartisan: "No candidate for any judicial or school office shall be nominated or elected upon any party ticket, nor shall any designation of party or principle represented be used in the nomination or election of any such candidate." Current law continues to prohibit party designations from

appearing on the ballot for judicial elections as well as a number of other offices. Wis. Stat. §§ 5.58 and 5.60.

In 1915, a committee headed by Chief Justice Winslow was formed to consider improvements to the Wisconsin judiciary. In its report to the legislature, the committee wrote:

The unwritten code which has so happily developed in this state, by which a circuit judge who shows his fitness for the office is retained in the service without regard to political considerations term after term, has been of great service in rendering our courts stable, learned and respected. It has also tended strongly to make them independent and fearless and has well nigh put an end to the judge with his ear to the ground.

In 1934, the Wisconsin Bar Association recommended that the state's elective judicial system be replaced with one consisting of appointment by the governor followed by the voters' option to retain the judge every six years. This recommendation was never adopted or seriously considered by the legislature. In 1938, the bar prepared another report in which it stated: "Thanks to our completely nonpartisan judicial elections, and the conscientious manner in which our governors of all parties have, in the main, made their judicial appointments in the past, the Wisconsin judicial system is not in any dire need of change."

In 1968, the Wisconsin Supreme Court amended the judicial code of conduct to prohibit judges from joining a political party. In October 2004, the supreme court amended the code to extend a number of rules to cover judicial candidates as well as judges, including prohibitions on party membership, partisan endorse-

ments and personal solicitation of campaign contributions. *In the Matter of the Amendment of Supreme Court Rules: SCR Chapter 60, Code of Judicial Conduct-Campaigns, Elections, Political Activity*, No. 00-07, 2004 WI 34 (Oct. 29, 2004).

OPINION

The starting point for each of plaintiff's claims is *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (White I), in which the Supreme Court held that a judicial ethical canon violated the First Amendment by prohibiting judicial candidates from "announcing" their views on "disputed political and legal issues." Plaintiff contends that the provisions he is challenging are legally indistinguishable from Minnesota's announcement canon and therefore must fall under *White I*. He also relies on the decision by the Court of Appeals for the Eighth Circuit after *White I* was remanded in which the court invalidated rules prohibiting judges from engaging in partisan activity and personally soliciting campaign contributions. *Republican Party of Minnesota v. White*, 416 F.3d 738, 755 (8th Cir.2005) (en banc) (*White II*). Defendants contend that *White II* was wrongly decided and that *White I* is not instructive because that case did not involve rules limiting partisan activity or campaign solicitations and because Wisconsin's rules do not prevent judicial candidates from effective campaigning as Minnesota's did.

Although I disagree with plaintiff that *White I* is on all fours with this case, defendants cannot cabin *White I* to its precise facts. It provides an important framework for evaluating plaintiff's claims.

A. SCR 60.06(2)(b) 1: Party Membership

Wisconsin Supreme Court Rule 60.06(2)(b) 1 says that "[n]o judge or candidate for judicial office or judge-elect may ... [b]e a member of any political party." The rules permit those with previous political ties to run for judicial office, SCR 60.06(2)(a), and they permit a "partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect ... to engage in partisan political activities required by his or her present position." SCR 60.06(2)(c). Plaintiff contends that the rule prohibiting party membership prevents him from exercising his First Amendment rights to associate and express his political viewpoints, *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000), and that the code's restrictions on that right are subject to strict scrutiny because they prohibit speech on the basis of content. *E.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (laws that restrict content of speech by subset of speakers "demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)").

1. Standard of review

Under a strict scrutiny analysis, defendants have the burden of showing that SCR 60.06(2)(b) 1 is narrowly tailored to further a compelling state interest by the least restrictive means. *Johnson v. California*, 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); *United States v. Playboy Entertainment Group, Inc.*,

529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). Defendants do not address plaintiff's position that strict scrutiny is the proper standard of review, but seem to concede that plaintiff is correct by structuring their briefs to follow a strict scrutiny analysis. *See also White II*, 416 F.3d at 748-49 (applying strict scrutiny to restriction on partisan activities of judges and judicial candidates); *Carey v. Wolnitzek*, 2008 WL 4602786, *5 (E.D.Ky.2008) (same).

On the other hand, defendants go to some length to distinguish this case from *White I* on the ground that, unlike the rule at issue in White I, SCR 60.06(2)(b) 1 "does not limit a candidate's ability to conduct an effective campaign." Dfts.' Br. at 17, dkt. # 49. This suggests that defendants believe that the standard of review should be something less than strict scrutiny. In particular, defendants say that Minnesota's rule prevented candidates from talking about "issues" while the Wisconsin rule "address[es] the qualifications for serving in a position, which is an area where the government has traditionally had wide discretion." Id. at 9 (*citing Moss v. Martin*, 473 F.3d 694 (7th Cir.2007)). In addition, defendants say that plaintiff has admitted that the rules do not interfere with his campaigning because he has testified that he does not want "to appeal to overheated rhetoric in a partisan nature." Dfts.' PFOF ¶ 53, dkt. # 58.

Despite defendants' efforts to distinguish this case from White I, they do not explain how their observations are relevant to determining the constitutionality of SCR 60.06(2)(b)1. Any differences between this case and White I are unimportant unless those differences point to a different result. If the standard of review is

strict scrutiny, as defendants appear to concede, it makes no difference whether plaintiff wishes to join a political party to further his campaign or for more personal reasons. The only relevant question would be whether defendants can show that the rule against doing so is narrowly tailored to further a compelling state interest.

I do not understand defendants to be arguing that the court should apply a more deferential standard of review because plaintiff's speech is unrelated to his campaign. Even if that is their argument, it is unlikely that they could prevail on it. First, even if party membership had no relevance to a judicial campaign, it does not follow necessarily that a different standard of review would apply. The general rule is that any content-based restriction on speech is subject to strict scrutiny. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) ("We have consistently applied strict scrutiny to such content-based regulations of speech."). Second, plaintiff did not say that he would be silent about his political affiliation during campaigns; he said that he wants to identify himself as a Democrat in candidate questionnaires.

Plaintiff's personal reasons for wanting to join the Democratic Party or to announce his affiliation with the party are irrelevant under *White I*. Although the Court emphasized that Minnesota's rule prohibited speech in the context of political campaigns, the issue for the Court was not whether the rule allowed the candidate "to conduct an effective campaign," but whether Minnesota was preventing candidates from giving voters information they might find relevant in

making their choice. *White I*, 536 U.S. at 782, 122 S.Ct. 2528 ("We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.") (internal quotations and citations omitted). Arguably, a candidate's political affiliation communicates as much or more information to a voter than that candidate's stance on any one issue. Although it may be an overstatement to say that party membership is "shorthand for the views a judicial candidate holds," *White II*, 416 F.3d at 754, it is certainly a piece of information that many voters would be interested in knowing, "for the obvious reason that" they believe "it reflects how the person will likely decide cases." Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 Ind. L.Rev. 735, 738 (2002). This is no doubt why "Presidents have always used ideology as one criteria in selecting judges." Id.

One might argue that even if a candidate's political affiliation is informative, it is not a "relevant" consideration for voters in a judicial election because party preference is not something that should have any bearing on how a judge decides a case. Defendants hint at this view when they say that the difference between SCR 60.06(2)(b)1 and Minnesota's rule is that the Wisconsin rule is aimed at the qualifications for service. In other words, the government should have the authority to decide the proper qualifications for a judge and, concomitantly, what information about the candidate that the voters may consider.

Such a view cannot prevail in light of *White I*, 536 U.S. at 774, 122 S.Ct. 2528, which holds that the government does not have discretion to restrict "speech

about the qualifications of candidates for public office," because " '[i]t is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.' " *Id.* at 782, 122 S.Ct. 2528 (*quoting Brown v. Hartlage*, 456 U.S. 45, 60, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982)). In other words, in an election, it is the voters, not the government, who determine whether particular information about a candidate is a relevant consideration in casting their votes; the government does not have unrestrained authority to restrict candidates' speech in order to insure that voters consider only the "correct" criteria. *Buckley v. Valeo*, 424 U.S. 1, 57, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("In the free society ordained by our Constitution it is not the government but the people ... who must retain control over the quantity and range of debate on public issues in a political campaign."); *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This, of course, includes discussions of candidates.") In this respect, it is difficult to see how Wisconsin's rule of prohibiting judges and candidates from identifying themselves as a member of a political party is any different from Minnesota's rule of prohibiting candidates from announcing their views on "disputed ... political issues." *Id.* at 770, 122 S.Ct. 2528 (*quoting* Minn.Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002)).

In another attempt to show that strict scrutiny is not the applicable standard of review, defendants cite

Garcetti v. Ceballos, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), for the proposition that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedoms." They also cite *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 579, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973), in which the Court upheld provisions in the Hatch Act that restricted the political activity of certain public employees. Defendants may mean to suggest that the court should apply a test similar to the one in *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), which provided the standard of review for both *Letter Carriers* and *Garcetti*. Under *Pickering*, courts do not apply strict scrutiny but a more straightforward balancing of a public employee's right to speak out on matters of public concern against the government's interest in "promoting the efficiency of the public services it performs through its employees." *Letter Carriers*, 413 U.S. at 564, 93 S.Ct. 2880 (*quoting Pickering*, 391 U.S. at 568, 88 S.Ct. 1731).

The *Pickering* standard does not provide a good fit in the context of this case. The reason for the more limited review in *Pickering* relates to the government's status as an employer and the traditional control that employers have over their employees. The government would be unable to provide services effectively and efficiently if federal courts routinely questioned "the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct.

1684, 75 L.Ed.2d 708 (1983). However, it is difficult to characterize an elected judge as a mere "employee" of the government or any discipline of that judge as a "personnel decision." It is the people rather than the government who decide ultimately whether any judge's performance is satisfactory.

Further, the Court has stated that the Hatch Act and the decision in *Letter Carriers* were targeted not at restricting but "protect[ing] employees' rights, notably their right to free expression," *United States v. National Treasury Employees Union*, 513 U.S. 454, 471, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (emphasis added), by keeping higher ranking officials from making "advancement in the Government service ... depend on political performance." *Letter Carriers*, 413 U.S. at 566, 93 S.Ct. 2880. *See also Elrod v. Burns*, 427 U.S. 347, 366-67, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("Legislative restraints on political management and campaigning were also upheld in *Letter Carriers* ... because they served to protect individual belief and association and, thereby, the political process.") Thus, it would appear that the rationale of *Letter Carriers* is largely inapplicable in cases in which the government's purpose is solely to limit speech rather than preserve it.

In a concurring opinion in *White I*, 536 U.S. at 796, 122 S.Ct. 2528, Justice Kennedy left open the question "[w]hether the rationale of [*Pickering*] could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning-in order to promote the efficient administration of justice." The majority did not distinguish between candidates and sitting judges; its focus was whether the

speech was made in the context of a campaign. In any event, to the extent such a distinction may be relevant, Justice Kennedy's question will have to remain open because SCR 60.06(2)(b)1 is not limited to sitting judges. To the extent any distinction between "campaigning judges" and "noncampaigning judges" is appropriate, such a distinction may have little meaning in a state like Wisconsin, which does not impose term limits on judges. Thus, in a sense, state judges in Wisconsin are always campaigning, at least until they decide to retire.

Finally, defendants raise the question whether SCR 60.06(2)(b)1 is entitled to "a strong presumption" that it is constitutional because it is part of a "universal and long-established tradition." *White I*, 536 U.S. at 785, 122 S.Ct. 2528 (*citing McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 375-77, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)). *See also Letter Carriers*, 413 U.S. at 557, 93 S.Ct. 2880 (upholding political restrictions on public employees in part because of tradition extending back to Thomas Jefferson that such employees should not be involved in politics). I cannot conclude that such a presumption is applicable in this case. It is true that at the turn of the century, the Wisconsin legislature changed the nomination process and the ballots in judicial elections from partisan to nonpartisan. However, that is not the "tradition" implicated by this case. Plaintiff is not trying to force the state of Wisconsin to place his political party next to his name on the ballot or change anything else about the way the state structures judicial elections. He wants to join a political party, a practice the legislature has never prohibited and that Wisconsin's judicial

code of conduct did not prohibit until 1968.

In *White I*, 536 U.S. at 786, 122 S.Ct. 2528, the Court declined to apply the presumption of constitutionality in the face of a showing that not only did the first model code of conduct published by the American Bar Association in 1924 contain a provision similar to Minnesota's rules restricting judicial candidates from taking positions on legal and political issues, but at the time *White I* was decided, all but four states holding judicial elections had a similar provision. *Id.* (stating that practice of prohibiting announcement of positions on legal issues was "relatively new to judicial elections"). Thus, Wisconsin's even more recently adopted prohibition on party affiliation cannot be deemed a "long-standing tradition" under *White I*. *Id.* at 786, 122 S.Ct. 2528 (noting that until later part of 20th century, "not only were judicial candidates (including judges) discussing disputed legal and political issues on the campaign trail, but they were touting party affiliations and angling for party nominations all the while").

Finally, nothing in the record shows that any state other than Wisconsin prohibits judges and judicial candidates from becoming members of political parties, making it impossible to argue that the restriction is "universal." It is unlikely that most states impose such a limitation on judges. None is included in the ABA's model code, which contains a number of rules regarding political activities, but no flat prohibition on party membership. American Bar Association, Model Code of Judicial Conduct, Canon 4 (2007). *See also* C. Scott Peters, *Canons, Cost and Competition in State Supreme Court Elections*, 91 Judicature 27 (listing six states other than Wisconsin that prohibit partisan

political activities for judicial candidates). Accordingly, I conclude that SCR 60.06(2)(b)1 is not entitled to a presumption of constitutionality and that the appropriate standard of review is strict scrutiny.

Once it is determined that strict scrutiny is the proper standard of review, it becomes difficult for defendants to show that SCR 60.06(2)(b) 1 is constitutional. It "is the rare case in which ... a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992); *see also North Dakota Family Alliance, Inc. v. Bader*, 361 F.Supp.2d 1021, 1041 (D.N.D.2005) (questioning "[w]hether the decision in *White [I]* left any room for the regulation of the speech of judicial candidates").

2. Identifying a compelling state interest

As *White I* showed, it is not easy to determine the contours of the compelling state interest that the restrictions on judicial candidates and judges are intended to advance. It is not enough to say that "nonpartisan elections" are the goal; it is necessary to focus on what values nonpartisan elections advance. Even saying that the ultimate goal is an impartial judiciary is not enough, as *White I* made clear. As the Court pointed out in that case, impartiality can refer to at least three different concepts: (1) the lack of bias for or against any party to a proceeding, which "guarantees a party that the judge who hears his case will apply the law to him in the same way it applies it to any other party," *White I*, 536 U.S. at 776, 122 S.Ct. 2528; (2) the lack of preconception in favor of or against a particular legal view, id. at 777, 122 S.Ct. 2528 (a

kind of "impartiality" that is neither likely to be found in persons capable of being judges nor necessary to the administration of justice, *id.* at 777-78, 122 S.Ct. 2528); and (3) openmindedness in the sense of being willing to consider views that oppose one's own preconceptions and remain open to persuasion. *Id.* The Supreme Court was willing to concede that the third type of impartiality might be desirable, but it was persuaded that the Minnesota canon was not adopted to further that kind of impartiality, given the small number of public statements judicial candidates make in the course of a political campaign compared to those they make in their careers as judges or as lawyers or law professors before becoming judges.

In the context of this case, the interests advanced by Wisconsin's prohibition on announcing one's political party can be defined as (1) the absence of bias toward particular political parties that appear before the court or toward litigants who are members of a political party; and (2) the absence of improper influence by a political party or a political party's ideology. Added to these is the public's perception that judges are not biased or influenced by these improper influences. Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes*, Ohio St. L.J. 3, 3 (2003) ("Although the phrase is hard to define, the term 'judicial independence' embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll.")

*3. Determining whether any compelling interests are furthered by SCR 60.06(2)(b)*1

No one can doubt that states have a compelling interest in trying to insure that judges decide cases on the basis of the law and not because of a relationship with an outside influence. As defendants observe, "[t]he impartial judge is the essence of due process and the keystone of our concept of justice." Dfts.' Reply Br. at 1, dkt. # 61. *See also White I*, 536 U.S. at 793, 122 S.Ct. 2528 (Kennedy J., concurring) ("Judicial integrity is ... a state interest of the highest order."); *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 227 (7th Cir.1993) ("Justice under law is as fundamental a part of the Western political tradition as democratic self-government.") Acknowledgment of the importance of that interest in this country goes back at least as far as the Declaration of Independence, in which Jefferson condemned the British king because he "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

To acknowledge the great importance of an interest is not to give the government a free pass on showing that the interest is implicated by the restriction. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden."). The question in this case is whether "partisan" is a fair proxy for "partial," or "biased" or, stated another way, whether allowing judges and judicial candidates to join a political party will make it more likely that in fact or as perceived by the public, judges will decide cases on the basis of their political affiliation rather than their view of the law.

a. Bias toward particular litigants

At first look, it might appear that SCR 60.06(2)(b)1 furthers the state's interest in preventing bias or its appearance when a political party or closely associated person or entity appears as a litigant in a judge's court. After all, it has long been recognized that "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

Although the issue is subject to debate, one might argue that even when no money or personal relationship is involved, a judge may appear to have an "interest" in a case in which one of the litigants is a group to which he belongs. American Bar Association, Model Code of Judicial Conduct, Rule 2.11(A) (2007) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.") *But see White II*, 416 F.3d at 755 ("[T]he fact that the matter comes before a judge who is associated with the Republican or Democratic Party would not implicate concerns of bias for or against that party unless the judge were in some way involved in the case beyond simply having an "R" or "D," or "DFL" (denoting Minnesota's Democratic-Farmer-Labor Party) after his or her name."); *Florence County Democratic Party by Moore v. Johnson*, 281 S.C. 218, 314 S.E.2d 335 (1984) (recusal not required just because judge had been affiliated with litigant political party before becoming judge).

Assuming that the government has a compelling interest in keeping judges from deciding cases in which their own political party is a litigant, a closer inspection of SCR 60.06(2)(b)1 reveals that it does nothing to further that interest. In fact, the rule may actually

hinder the interest in preventing bias.

An assumption that SCR 60.06(2)(b)1 prevents potential bias in favor of a political party rests on another assumption: that invalidating the rule will create political preferences where none existed before. This would be true only if invalidation meant that judges and candidates were required to join a political party. In fact, it would merely permit those who already have a political preference to acknowledge it formally. I am not prepared to make the next assumption, which is that any judge like plaintiff who has stated his desire to join a party will become any more partisan-minded simply because he registers as a Democrat.

The current rule does not eliminate potential bias, but only hides it. One could argue that abolishing the rule furthers an interest in preventing biased judges from hearing cases. If those judges revealed their political affiliation, parties who thought the affiliation would make the judge biased against them could move for recusal. (An increase in motions for recusal can present many administrative difficulties, particularly in judicial districts with only one judge, but that is not a reason for upholding a ban against the provision of arguably relevant information.) As it stands now, there may be any number of state court judges who have strong political preferences in fact, but litigants are unable to learn this information because it is banned by the rule.

It is hard to argue that withholding the truth about a judge's or candidate's political preferences furthers a compelling interest in reducing the appearance of bias for or against particular litigants or that

adopting a policy of "ignorance is bliss" is a compelling or even legitimate way to maintain public confidence in the judiciary. The state has no interest in making judges appear open minded when in fact they are not. Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 3 (1949) ("It is a mistake ... to try to establish and maintain, through ignorance, public esteem for our courts.").

b. *Improper influence*

In determining whether SCR 60.06(2)(b)1 furthers an interest in preventing judges from deciding cases for partisan reasons or appearing to do so, the first step is to properly identify the scope of the rule and plaintiff's challenge to it. Defendants says that plaintiff is "attack [ing] the entire nonpartisan structure of the Wisconsin judiciary," Dfts.' Br. at 8, dkt. # 49, but that is a significant overstatement. It is important to note that plaintiff is not trying to force the state to place his party affiliation on the ballot; he is not asking to become a party leader or even become involved in party affairs; and he is not challenging the rule against "appeal[ing] to partisanship" in the context of an election. SCR 60.06(2)(a). Rather, he is simply asking to be able to tell the truth about his political preference. Thus, I need not decide whether any of those other activities might be prohibited without violating the First Amendment. The issue in this case is whether defendants' interests in a fair judiciary are implicated by allowing plaintiff to "be a member of [a] political party." SCR 60.60(2)(b)1. This is another distinction between Wisconsin's rule and the law at issue in *Letter Carriers*, 413 U.S. at 576, 579 n. 21, 93 S.Ct. 2880, which restricted the political activities of federal

employees but permitted them to be party members and "express [an] opinion on political subjects and candidates."

Defendants have little evidence to support their contention that their interest in preventing improper influence is furthered by SCR 60.06(2)(b)1. *Spargo v. New York State Commission on Judicial Conduct*, 244 F.Supp.2d 72, 88 (N.D.N.Y.2003) (noting "attenuated connection" between absolute prohibitions on political activity and need to prevent judicial bias). In fact, what little evidence defendants have may support plaintiff's position rather than their own.

1) Wisconsin's history of judicial elections

Defendants rely primarily on Wisconsin's own judicial history as evidence of the danger of partisan elections. This line of argument misses the mark. Plaintiff is not trying to change the ballot or give parties control over nominations. Defendants predict that party membership will lead to party control, but they have neither produced any evidence nor developed an argument in support of that prediction.

Even if I consider Wisconsin's history of judicial elections, it does not help defendants' case. Defendants argue that the danger of a partisan judiciary is shown by several controversial Wisconsin judicial elections held in the 1800s when candidates still ran under a partisan label. For example, defendants say that Justice Crawford was not re-elected in 1855 because of a dissent in a case about the Fugitive Slave Act and that Chief Justice Dixon almost lost his campaign for re-election a few years later after a dissent in a related case. These incidents do not support a conclusion that

improper party influence led to a particular outcome in a case or even to a perception of such influence. In the case of Chief Justice Dixon, he voted against what appears to have been his party's view at the time. Rather, what these incidents suggest is that whether elected judges are partisan or nonpartisan, they may face retribution from the voters when they take unpopular stances on legal issues. *E.g.*, Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 Notre Dame L.Rev. 1133, 1133 (1997) (discussing defeat of Tennessee Supreme Court Justice Penny White in nonpartisan retention election after she joined controversial decision reversing death penalty conviction). *See also White I*, 536 U.S. at 782, 122 S.Ct. 2528 (noting that "elected judges ... always face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench").

Defendants point to the "informal tradition" that developed in legislative caucuses in the latter part of the 19th century to obtain a partisan balance on the court. It is unclear how that practice could be viewed as showing the corrupting power of political parties on the court. If anything, it suggests that when party affiliation is out in the open, efforts are made to insure that the court represents different viewpoints, which many would consider to be a positive development that would have a moderating effect on the court. Richard A. Posner, *Law, Pragmatism and Democracy* 120 (2003) (acknowledging that "[v]alues ... influence judicial decisions" and arguing that "diverse judiciary" is important to prevent ideological hegemony on

courts); Stephen J. Choi and G. Mitu Gulati, *Trading Votes for Reasoning*, 81 S. Cal. L.Rev. 735, 739 (2008) ("[J]udges appear to moderate their voting in settings where there is potential diversity in political views.").

It appears that in the late 19th and early 20th centuries, party labels lost any significance they may have had for Wisconsin judicial candidates, even before the legislature made the elections officially nonpartisan in 1913. In 1909, the state supreme court had a Democratic majority, "despite the fact that voters consistently elected Republican governors and legislatures during this time and the Democratic party was very weak. Little attention was paid to ... partisan affiliations of the justices, demonstrating the absolute disappearance of partisan considerations by that time." DPFOF ¶ 31, dkt. # 50.

Even after judicial elections became nonpartisan in 1913, party membership was permitted until 1968. During that time, two special committees prepared reports regarding the Wisconsin judiciary. The 1915 report stated that Wisconsin judges are "retained in the service without regard to political considerations term after term" and the 1938 report stated that Wisconsin judicial elections remained "completely nonpartisan" and that "the Wisconsin judicial system is not in any dire need of change." Far from showing that party membership would doom the Wisconsin judiciary to corruption and bias, Wisconsin history suggests that a judicial candidate's political affiliation had little effect on voters' choices or judges' decision making.

The only other evidence defendants offer on the subject is the opinion of their expert, who says that

Wisconsin's "judges should maintain a nonpartisan appearance and should take care not [to] be perceived as advocates of a particular party." Ranney Aff. ¶ 19, dkt. # 54. Although defendants' expert may be highly qualified to testify about Wisconsin legal history, he is not an expert on public opinion or the effect on public opinion that a particular rule might have. (It is unlikely that anyone could be recognized as such an expert in the context of a lawsuit.) The sole basis for the expert's opinion is Wisconsin's judicial history, which I have concluded does not support defendants' position.

2) experience of other states

A dozen states employ officially partisan elections with respect to at least some judgeships. American Judicature Society, "Methods of Judicial Selection" *available at* http:// www. judicial selection. us/ judicial_ selection/ methods/ selection_ of_ judges. cfm? state= (last visited Feb. 6, 2009) (identifying the following states as employing partisan elections for at least some judicial offices: Alabama, Illinois, Kansas, Louisiana, Michigan, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas and West Virginia). Other states have nonpartisan elections but do not have Wisconsin's prohibition on party membership. One would think that if partisan behavior in judicial elections were as detrimental to the integrity of the judiciary as defendants say, so many states would not continue to maintain that system for so long, sometimes more than 150 years. F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 J. Legal Stud. 431, 435 ("New York became the first state to use partisan judicial elections to select

its high-court justices in 1847.") Whatever the experience of these states and the probability of data about that experience, neither side has made it a part of the record.

The only information on this issue was provided by plaintiff, who cited a survey of Minnesota residents published in January 2008, more than two years after Minnesota judges were permitted to join political parties. Of those surveyed, 76% said they had "confidence" in Minnesota judges, compared to 66% for the governor, 58% for the state legislature, 55% for lawyers and 48% for political parties. In addition, 78% said that the word "impartial" described Minnesota judges "very well" or "well," even though 65% said the same with respect to the word "political," suggesting that many believe the two ideas are not mutually exclusive. Justice at Stake, "2008 Minnesota Public Opinion Poll on Judicial Selections," *available at* http:// www. justice atstake. org/ node/ 15 (last visited Feb. 6, 2009). Although defendants question the survey results, they do not point to any contrary data.

It is true that some states holding partisan judicial elections have been criticized for especially contentious elections or controversial decisions that some view as harming the judiciary's reputation. *E.g.*, Ferris K. Nesheiwat, *Judicial Restraint*, 24 Quinnipiac L.Rev. 757, 790-91 (2006) (discussing partisan Ohio Supreme Court race in 2002 involving "huge sums of money" donated by interest groups, numerous attack ads and charges of unethical behavior by the candidates). However, there is no indication that the problems are peculiarly related to having a partisan election rather than to the election process itself or the way the

campaigns were funded. James Sample, David Pozen and Michael Young, Brennan Center for Justice, *Fair Courts: Setting Recusal Standards* (2008) (noting that fund raising for judicial elections between 2000 and 2004 had increased 67% from previous four years to $123 million and concluding that, "[o]f the emerging threats to judicial impartiality and the appearance of impartiality, perhaps most fundamental is the influence of money."); Brian Troutman, *Party Over? The Politics of North Carolina's "Nonpartisan" Elections*, 86 N.C. L.Rev. 1762, 1781 (2008) (discussing North Carolina's recent change from partisan to nonpartisan judicial elections and concluding same problems remained while voter turnout decreased); *see also White I*, 536 U.S. at 789-90, 122 S.Ct. 2528 (O'Connor, J., concurring) (describing threats to judicial impartiality created by "the very practice of electing judges," including "potential electoral consequences of ... decisions" and "feeling indebted to certain parties or interest groups").

3) Wisconsin's recent experiences with judicial elections

Wisconsin's own recent history demonstrates that a nonpartisan judiciary is no panacea for the problems of contentious elections or perceptions of bias. *E.g.*, Ryan J. Foley, "New panel named to hear case against Wisconsin Justice," AP Alert (October 28, 2008) (panel formed to determine whether state supreme court justice ran ad that was "deliberately misleading" by "suggest[ing his opponent] helped free a child rapist"); Dee J. Hall, "Supreme Court's newest member reprimanded over conflicts of interest," Wisconsin State Journal (May 29, 2008) (state supreme court justice reprimanded for sitting on cases involving bank for

which her husband served as director); Marie A. Failinger, *Can a Good Judge Be a Good Politician?*, 70 Mo. L.Rev. 433, 447 (Spring 2005) (noting that 75% of all cases coming before Wisconsin Supreme Court in 1990s involved lawyer, firm or company that had contributed to one or more of its justices).

With respect to the problem of campaign contributions in particular, a recent survey of 600 Wisconsin residents showed that 78% of those polled believe that such contributions have "a great deal" or "some" influence on Wisconsin judges' decisions and that 65% support public financing in judicial elections. Justice at Stake, "2008 Wisconsin Public Opinion Poll on Judicial Selections," *available at* http:// www. justice atstake. org/ node/ 15 (last visited Feb. 6, 2009). In light of the perceived influence of campaign donors, it seems almost disingenuous to say that mere party membership is the real threat. After all, joining a party is simply a statement of belief; in itself, it does not suggest that a candidate is beholden to the party in the way that accepting a contribution does.

This brings up a related question, which is whether the gag order imposed by SCR 60.06(2)(b)1 is fooling anyone. Many if not most judicial candidates have political lives before their judicial campaigns and often are easily identified as "Republican" or "Democrat" even if they do not explicitly run as such. Certainly, the political parties themselves have had no difficulty picking "their" candidate in recent Wisconsin judicial elections. Dee J. Hall, "Judicial Races More Partisan," Wisconsin State Journal (Nov. 18, 2008) *available at*

2008 WLNR 22059128 (noting that candidates Linda Clifford and former Justice Louis Butler received substantial assistance from Democratic organizations in their campaigns while Republican Party supported now-Justices Annette Ziegler and Michael Gableman and former Justice Diane Sykes). The voters should be given at least as much credit for their ability to figure things out for themselves. Once that reality is acknowledged, it is difficult to argue that the government has a compelling interest in stopping judges and candidates from saying out loud what everyone already knows.

4) other considerations

Whatever the cause of the problems confronting the judicial election process, it is likely that it is not because there are too few speech restrictions. In fact, after the Supreme Court held in White I that "announce" clauses are unconstitutional, "the general report on judicial campaign activity was that the rhetoric and 'attacks' were less frequent and more restrained-even though largely voluntary-than in the 2000 judicial campaign season." Ferris K. Nesheiwat, *Judicial Restraint*, 24 Quinnipiac L.Rev. 757, 789 (2006). The same is true regarding the public's perception of the judiciary. A recent study concluded that "the strictness of a state's code of judicial conduct does not significantly affect how impartially that state's judges are perceived," suggesting that little is to be gained from severely curtailing the First Amendment rights of judicial candidates. Benjamin B. Strawn, *Do Judicial Ethics Canons Affect Perceptions of Judicial Impartiality?*, 88 B.U.L.Rev. 781, 785 (2008). By limiting the information available to voters, the primary contribu-

tion of expansive speech restrictions may be nothing more than "reducing competition and protecting incumbents." C. Scott Peters, *Canons, Cost and Competition in State Supreme Court Elections*, 91 Judicature 27 (Jul.-Aug. 2007) ("[I]ncumbents would likely benefit from less competitive elections if ethical restrictions make it more difficult for campaigns to communicate their views to voters.")

Of course, it would be unrealistic to say that a judge's political affiliation has no effect on his decision making process. For example, a Republican may be more likely to view himself as a "strict constructionist" while a Democrat may be more likely to believe in a "Living Constitution." But to say that a judge comes to the bench with certain beliefs about the proper functioning of government does not necessarily make him unfit to serve. As Oliver Wendell Holmes, Jr., recognized, "the life of the law" is not cold logic, but "experience," including "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men." Oliver Wendell Holmes, Jr., *Common Law* 1 (1881) (emphasis added). It is simply not possible, or even desirable, to stamp out all the views a judge had before he took the bench and little to be gained from pretending that we can.

Many groups to which a judge belongs may have an influence on his judicial philosophy and interpretation of the laws. For example, in a recent book Judge Posner noted a study finding that Roman Catholic judges are 11% more likely to rule against gay rights than Protestant judges and 25% more likely to do so

than Jewish judges. Richard A. Posner, *Law, Pragmatism and Democracy* 120 (2003) (*citing* Daniel R. Pinello, *Gay Rights and American Law* 203). Does this mean that Catholics (or Protestants or Jews) should be forced to recuse themselves in cases in which gay rights are at issue? Or to make the question even more similar to this case, that judges should be prohibited from religious affiliation because of the effect it might have on their decisions? The answers to these questions are obvious. We expect that judges will do their best to set aside their religious beliefs when deciding legal questions even if we understand that their personal experiences may inform their judgment.

As with potential bias toward particular litigants, even if one believes that a judge with a partisan preference is more likely to decide cases for partisan reasons, prohibiting him from publicly acknowledging that preference does nothing to make him more open minded. It only allows him to pretend that he is. The best way to eliminate potential bias is to shine a light on it, not cover it up.

Similarly, any argument that a policy of openness will undermine public confidence in the judiciary is unpersuasive. Again, it is dubious that the state has a legitimate interest in maintaining public confidence in the judiciary by concealing information. In the context of a democratic election, "you can't handle the truth," is rarely an adequate justification for a restriction on speech.

Further, in Wisconsin, the voters, not the government, have the final say regarding which judges keep their jobs. If the voters believe that a candidate who declares his party preference will erode their confi-

dence in the judiciary, they may quickly send that message by refusing to elect him. As Justice Stevens wrote in *White I*, 536 U.S. at 797, 122 S.Ct. 2528 (Stevens, J., dissenting), those who believe that judicial candidates are acting improperly are free to exercise their own First Amendment rights by attempting to persuade the voters of their view.

By limiting the speech available to voters, the government is taking the paternalistic view that the voters cannot be trusted to exercise their rights wisely. If that is indeed what the government believes, it has a duty to educate voters about the qualifications for judges or change its system of judicial selection. Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 Judicature 300, 300-02 (1992) (concluding that voting behavior depends on kind of information voters receive). The problem of an uninformed public should not be solved by depriving them of even more information than they otherwise might have. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 228, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (any argument that government is "enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism").

4. Narrow tailoring: underinclusiveness

Even if I assumed that SCR 60.06(2)(b) 1 furthered interests in reducing perceptions of bias or improper influence, the rule would still be vulnerable to a First Amendment challenge on the ground that it is underinclusive. *White I*, 536 U.S. at 780, 122 S.Ct. 2528 ("[A] law cannot be regarded as protecting an

interest of the highest order, and thus as justifying a restriction upon ... speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.") (Internal quotations omitted); *City of Ladue v. Gilleo*, 512 U.S. 43, 51, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) ("[T]he notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles."). In one sense, any attempt to limit improper influence in the judiciary could be called underinclusive so long as a state continues to require judges to face re-election. Because elected judges know that their continued employment is contingent on voter satisfaction with their performance, the potential for judicial bias or the perception of it is present any time a judge is faced with a controversial decision that may inflame a large or powerful block of voters. *White I*, 536 U.S. at 789, 122 S.Ct. 2528 (O'Connor J., concurring) ("Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.").

The parties' discussion of underinclusiveness focuses on judges' and candidates' involvement with special interest groups, which the Wisconsin Code of Judicial Conduct does not specifically prohibit. Plaintiff says that by prohibiting party membership while leaving interest group membership unregulated, defendants have failed to protect any interest they have in preventing improper influence on judges. This perceived disparity in treatment between parties and interest groups was key to the conclusion in *White II*, 416 F.3d at 758, that Minnesota's prohibition on partisan activities was unconstitutional.

Defendants' response to plaintiff's charge has two parts. First, defendants say that plaintiff is wrong about the code's failure to regulate judges' relationships with special interest groups. According to defendants, the code does prohibit membership in interest groups when read carefully. Second, defendants say that any differential treatment in the code between political parties and special interest groups is justified because parties are more "pervasive" and pose "the most critical threat" to the state's interest in judicial impartiality. Dfts.' Br. at 18-19, dkt. # 49.

With respect to their first argument, defendants acknowledge that, on its face, the code is silent regarding prohibited relationships with special interest groups. In fact, it expressly permits judges to belong to "a nonprofit educational, religious, charitable, fraternal, sororal or civic organization." SCR 60.05(3)(c). However, defendants cite a 2002 advisory opinion of the Judicial Conduct Advisory Committee that concluded that the code prohibited a "judge [from serving] as president of a civic, non-profit organization, a substantial part of whose mission is to advocate social goals through litigation and legislative action" under provisions regarding "the appearance of impropriety," SCR 60.03, activities that might "[c]ast reasonable doubt on the judges's capacity to act impartially as a judge," SCR 60.05(1)(a), and other similarly general provisions. Second Alexander Aff., exh. Q, at 1, dkt. # 51.

Defendants do not point to any Wisconsin court decisions that have adopted the committee's expansive view of the code or identify any instance in which a Wisconsin judge was threatened with discipline be-

cause of his involvement in an interest group. The opinion itself notes that it is not binding, even on the commission. Id. at 4. Interestingly, although Minnesota's code contains provisions identical to the ones cited in the committee's advisory opinion, neither the defendants nor the dissenting judges in *White II* defended Minnesota's partisan activities clause from a charge of underinclusiveness by arguing that interest group involvement was prohibited as well.

Even if the committee's advisory opinion represents an accurate interpretation of the code of conduct, a lack of parity still exists in the treatment of political parties and interest groups. SCR 60.06(2)(b)1 is a flat prohibition on party membership whereas the advisory opinion suggests that at most the code prohibits judges from taking leadership positions in advocacy groups because the "president is inevitably identified with [the] goals [of the group] and often serves as their advocate." Second Alexander Aff., exh. Q, at 3, dkt. # 51. Thus, the interpretation of the advisory opinion appears to be similar to restrictions on federal employees in the Hatch Act, which prohibit some involvement in politics but still permit employees to express their opinions or join a political party. *Letter Carriers*, 413 U.S. at 576, 579 & n. 21, 93 S.Ct. 2880. If anything, the advisory opinion raises the question why the judicial code of conduct does not address political involvement of judges in the same way.

This leaves defendants' alternative argument, which is that political parties are a greater threat to the judiciary than interest groups. However, defendants have not "carried the burden imposed by [the]

strict-scrutiny test to establish ... that" political parties "are uniquely destructive of open-mindedness." *White*, 536 U.S. at 781, 122 S.Ct. 2528. Instead, defendants simply cite the following discussion in *McConnell v. FEC*, 540 U.S. 93, 118, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), approving distinctions made in federal campaign finance laws between parties and interest groups:

> Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group ... Congress' efforts at campaign finance regulation may account for these salient differences.

The problem with relying on this passage is that none of these differences between political parties and interest groups are relevant in this case. Even if SCR 60.06(2)(b)1 falls, political parties will not "select slates of candidates for [judicial] elections," "determine who will serve on [judicial] committees" or have any other "influence and power" that "exceeds that of any interest group." These things may loom on the horizon but they are not before the court at this time. When and if they are, they can be addressed. SCR 60.06(2)(b)1 is about party membership only, not party control.

If the question is one of unofficial influence,

defendants have made no showing that political parties are more influential than interest groups in the context of judicial elections. *White II*, 416 F.3d at 760-61 (concluding that "the influence of ... special [interest] groups is at least as great as any posed by political parties"). It may be that the opposite is true in Wisconsin, at least if one looks at the amount of campaign contributions. *Compare* Patrick Marley and Stacy Forster, "Ziegler, big lobby think alike," Milwaukee Journal Sentinel (Jul. 12, 2008) (supreme court justice authored 4-3 decision siding with group that spent $2 million in support of that justice's election campaign) with Dee J. Hall, "Growing partisanship marks Wisconsin judicial races," Wisconsin State Journal (Nov. 18, 2008) (same supreme court justice received $1,000 from Republican Party during campaign); *see also* Scott D. Weiner, Popular Justice: State Judicial Elections and Procedural Due Process, 31 Harv.C.R.-C.L.L.Rev. 187,208 (1996) ("[S]pecial interest groups can manipulate judicial elections so that meaningful public participation is illusory."); Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 Judicature 128, 132 (1990) ("It is nearly impossible in today's costly election process to be able to garner the kind of dollars necessary for statewide election without becoming identified with various interest groups.")

Membership in interest groups may be more problematic than membership in a party simply because the issues represented by interest groups are more likely to come before a court than issues related directly to a political party. Also, interest groups often represent more extreme views than those of a political party, which is a much looser and more varied collec-

tion of view points. *McConnell v. Federal Election Commission*, 251 F.Supp.2d 176, 335 (D.D.C.2003) (citing expert testimony that "[n]o other group could come close to political parties in moderating extreme views"). Thus, membership in the former is potentially a stronger indicator that the judge has made his mind up on a particular issue. *White II*, 416 F.3d at 759-60.

However, even if I assumed that partisan influence were more "pervasive" than that of interest groups, SCR 60.06(2)(b) 1 is still "woefully underinclusive," *White I*, 536 U.S. at 780, 122 S.Ct. 2528, because it does not prohibit candidates from accepting campaign contributions from political parties. It is hard to conclude that the public would be more suspicious of a judge's acknowledgment, "I am a Republican," than his statement, "I was elected in part thanks to contributions from the Republican Party." Any argument to the contrary is inconsistent with both common sense and the views of Wisconsin citizens as reflected in polls showing the perceived influence of campaign contributions on judicial decisions.

Also, I agree with plaintiff that SCR 60.06(2)(b) 1 is underinclusive because it does not prohibit individuals from running for judicial office regardless of a pervasively political past and it allows partisan office holders to keep their jobs even after their judicial campaign has begun. SCR 60.06(2)(a) and (c). Neither of these exceptions to the rule is consistent with defendants' position that any "partisan affiliations threaten public confidence regardless*882 whether or not there is actual bias." Dfts.' Br. at 8, dkt. # 49.

The exception for previous political activity is

problematic because it is implausible to suggest that a life long political leader is less likely to be perceived as biased than someone who is simply a party member with no involvement in party affairs. *Cf. White I*, 536 U.S. at 778-79, 122 S.Ct. 2528 (implausible to suggest that statements made during judicial campaign more indicative of closed mind than repeated statements made before becoming candidate). Like the exception for past political involvement, the exception for candidates with partisan jobs is an understandable acknowledgment that many qualified candidates for judicial office will come from the political arena. It may be that defendants believe that the public is likely to understand that employment by a political party does not necessarily mean one is biased in favor of that party. However, if that is so, it is an acknowledgment that mere association with a political party is not the problem. At most, defendants' interests are implicated when a judge or candidate appeals to partisan interests during a campaign or otherwise, but that interest is covered by a separate rule, SCR 60.06(2)(a), that is not being challenged in this case.

5. Least restrictive means

Finally, SCR 60.06(2)(b)1 fails strict scrutiny because defendants have failed to show that it is the least restrictive means the state could use to accomplish its legitimate goals. *Playboy Entertainment Group, Inc.*, 529 U.S. at 813, 120 S.Ct. 1878. To the extent the state wishes to eliminate partisan bias or its appearance in judicial decisions, the code of conduct includes rules tailored to address these concerns. *E.g.*, SCR 60.03(2) ("A judge may not allow family, social, political or other relationships to influence the judge's

judicial conduct or judgment."). Defendants have not explained why these narrower rules are insufficient to meet their concerns.

Further, defendants have failed to show that strong recusal standards are not a satisfactory alternative for preventing judges from deciding cases in which they may be biased or appear to be. Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L.Rev. 563, 570 (2004) (arguing that "the possibility of this less-speech-restrictive alternative suggests that even the narrowest content-based prohibitions on truthful judicial campaign speech may be unconstitutional"). A state "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards." *White I*, 536 U.S. at 794, 122 S.Ct. 2528 (Kennedy, J., concurring); *see also* Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 Drake L.Rev. 691 (2007). Because the vast majority of cases do not raise partisan issues, a requirement for recusal in those cases that do would be a more narrowly tailored way to further the government's interests and would not impose an undue administrative burden on the judiciary. *White II*, 416 F.3d at 755. (I need not decide whether recusal actually would be required in any particular case, only whether recusal would be sufficient to satisfy any interest that defendants may have in an impartial judiciary.)

Defendants make only weak objections to the viability of recusal as an alternative in an appropriate case. First, they say that recusal is impractical because

political parties and party officials are "frequent" litigants, but they cite only five Wisconsin cases from the last six years in which that is true. Dfts.' Br. at 7 & n.2, dkt. # 49. Certainly, a judge is no more likely to receive a case involving party leaders than one involving a company in which he owns stock, but no one would suggest that judges should be prohibited from making financial investments (rather than being required to disclose those investments they do make and recuse themselves when necessary).

Second, defendants say that recusal is not a "workable" option because some counties may have only one or two judges assigned to them. Dfts.' Br. at 21, dkt. # 49. That is a problem for many counties, but it is not one that is limited to potential partisan bias. It is true whenever any form of bias is involved. Taken to its logical conclusion, which would be nonsense, recusal standards should be abolished all together and replaced with prohibitions on judges' establishing any relationship that might later create a conflict. In any event, the Wisconsin legislature has determined that recusal is an appropriate method of addressing potential judicial bias, Wis. Stat. § 757.19.

Of course, if all or most judges joined political parties in the absence of SCR 60.06(2)(b) 1, using recusal as a solution to potential conflicts might become more difficult in those few cases in which a political party was a litigant or a partisan issue was the focus of the lawsuit. However, defendants make no showing that such a scenario is likely. Judicial candidates have an interest apart from the ethical canons in disassociating themselves from partisan groups or extreme positions lest they be deemed by the commu-

nity to be too political. *Matter of the Amendment of Supreme Court Rules* at 17 (Prosser, J., dissenting) ("[T]he public tends to re-elect judges who wage nonpartisan or bipartisan campaigns and who conduct themselves without partisanship in office."); Geri L. Dreiling, "Pick and Choose Judicial Candidates Defeated," ABA Journal E-Report (June 9, 2006) (discussing defeat of four Republican judicial candidates in Alabama who were defeated after "endors [ing] the notion that a state court judge need not follow Supreme Court precedent if he or she deems it clearly erroneous"). This view is supported by the lack of any evidence that Wisconsin judges embraced party labels between 1913 and 1968, when elections were officially nonpartisan but party membership was still allowed.

Recusal might become a less practical solution if it were extended to any case in which one of the litigants was simply a member of the same political party as the presiding judge, but there could be no serious argument that such a sweeping prophylactic would be necessary. *E.g., Perry v. State*, 585 N.E.2d 715 (Ind.Ct.App.1992) (trial judge not required to recuse herself in robbery prosecution merely because judge and alleged robbery victim were both candidates on same political party slate); *Sears v. Olivarez*, 28 S.W.3d 611 (Tex.Ct.App.2000) (recusal not required when litigant's lawyer was running for office on political party other than that of judge); *cf. Kozuszek v. Brewer*, 546 F.3d 485, 490 (7th Cir.2008) (stating that it does not "mak[e] sense" to believe that "a party member aggrieved by an election can successfully sue under section 1983 simply because a rival party administered the election"). Further, it is unlikely that in the vast

majority of cases the judge will have reason to know a litigant's political affiliation, if any.

In sum, SCR 60.06(2)(b)1 is unconstitutional because it does not further any compelling state interests. Even if it did, it would not pass strict scrutiny because it is not narrowly tailored and there are less restrictive means available to accomplish any legitimate goals.

B. SCR 60.06(2)(b)4: Endorsement of Partisan Candidates

Supreme Court Rule 60.06(2)(b) 4 says that "[n]o judge or candidate for judicial office or judge-elect may ... [p]ublicly endorse or speak on behalf of [a political party's] candidates or platforms." Endorsements of nonpartisan candidates are permitted. Because plaintiff seeks to endorse partisan candidates but says nothing about endorsing a political party's "platform," I do not consider the constitutionality of that part of the rule.

1. Justiciability

In an order dated November 7, 2008, 2008 WL 4862081, I noted that in plaintiff's summary judgment materials, Barack Obama was the sole candidate that plaintiff said he wished to endorse. Because Obama has now won the presidential election, I asked plaintiff to address the question whether his challenge to SCR 60.06(2)(b)4 was still justiciable. *Renne v. Geary*, 501 U.S. 312, 321, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991) (when alleged First Amendment injury is inability to endorse candidate, claim may not be justiciable unless

plaintiff can point to "particular candidate" he wishes to endorse in future).

In his response to the order, plaintiff says that his challenge to the rule remains justiciable for two reasons. First, he says that he would like to support Governor Jim Doyle in the 2010 Wisconsin gubernatorial election and President Obama in the 2012 presidential election. The problem with these proposed endorsements is that plaintiff has adduced no evidence that either candidate has announced his candidacy for these upcoming elections or has indicated his intentions to do so. Plaintiff cannot endorse a nonexistent candidate.

Nevertheless, I am persuaded by plaintiff's second argument, which is that his claim remains justiciable because it is "capable of repetition yet evading review." *Davis v. Federal Election Commission*, --- U.S. ----, 128 S.Ct. 2759, 2769, 171 L.Ed.2d 737 (2008). This doctrine allows judges to decide claims even though they may be technically moot when (1) the activity in dispute begins and ends more quickly than the typical lawsuit and (2) a "reasonable expectation" exists that the plaintiff will engage in the same conduct again. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). Both the Supreme Court and the Court of Appeals for the Seventh Circuit have recognized that an election cycle fits within the first part of this test, *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); Buckley, 997 F.2d at 226, and plaintiff has satisfied the second part by stating his intention to run for reelection in 2011 and endorse partisan candidates in the future. Accordingly, I conclude that it is proper to decide plaintiff's claim

challenging SCR 60.06(2)(b)4.

2. Constitutionality

In its present form, SCR 60.06(2)(b) 4 falls for essentially the same reasons as SCR 60.06(2)(b)1. Again, defendants do not seriously challenge plaintiff's contention that strict scrutiny is the appropriate standard of review because the rule represents another content-based restriction on political speech. In their reply brief, defendants say that no " 'core' First Amendment right [is] at stake" because "[p]laintiff has provided no evidence that it is a necessary or integral part of his candidacy for him to be able to make partisan endorsements." Dfts.' Reply Br. at 9, dkt. # 61.

Defendants' argument rests on the same mistaken assumption underlying their view of the party membership issue, which is that plaintiff's right is contingent on what is necessary to run an "effective" campaign. As plaintiff points out, voters could consider the type of candidates he endorses in evaluating the type of judge he is likely to be. And even if his endorsements did not have a significant impact on his own election, it would still be speech made "in the course of a political campaign" for the other candidate, which is enough under *White I*, 536 U.S. at 782, 122 S.Ct. 2528, to trigger strict scrutiny.

Defendants' asserted interests in SCR 60.06(2)(b)4 appear to be similar to the interests underlying SCR 60.06(2)(b)4: (1) preventing bias and its appearance in favor of the endorsed candidate; (2) preventing bias and its appearance in favor of the endorsed candidate's political party or ideology. The problems with relying on these interests are similar as well. Like the prohibi-

tion on party membership, the prohibition on endorsements of partisan candidates can only mask a preference that a judge already has for a particular candidate. Forcing the judge to remain silent about his preference does not make his preference go away.

To the extent defendants mean to argue that making the preference public also makes its likely effect on the judge's rulings stronger, the Supreme Court rejected that view with respect to statements on legal and political issues in *White I*, 536 U.S. at 780, 122 S.Ct. 2528, and it is even less plausible in the context of an endorsement. Although making an endorsement suggests that the speaker believes the candidate is qualified for office, there is no reason to believe that a judge would feel obligated to rule a particular way as a result of the endorsement. After all, an endorsement does not create any sense of indebtedness; the judge is presumably giving a benefit rather than receiving one.

Defendants do not argue that it is improper for a judge to use the visibility and prestige of her office to make an endorsement. This would be a strong argument were in not for the fact that judges are allowed to make endorsements at present, although they are restricted to endorsing judicial candidates. If defendants were concerned about the potential bias generated by endorsements, one would think that they would ban all endorsements rather than just those of partisan candidates. Whatever bias an endorsement creates in favor of a particular person, defendants identify no reason why the bias would be greater if that person ran with a party label. This suggests that defendants' concern is not bias in favor of an individ-

ual, but only bias in favor of the candidate's political party.

Any concern about general partisan bias is even more attenuated with respect to an endorsement than it is for party membership. Defendants' argument is that if plaintiff says, "I endorse Barack Obama," plaintiff is really saying, "I will decide cases on the basis of the Democratic Party's ideology rather than the facts and law of the case." That makes little sense. After all, a judge may decide to endorse a partisan candidate for any number of reasons, many of them unrelated to the candidate's party. If defendants are concerned that a judge will begin indiscriminately endorsing candidates of a single party in order to communicate to the voters that he has strong partisan ties, that would likely fall under the rubric of the prohibition on "appealing to partisanship," SCR 60.06(2)(a), which plaintiff is not challenging.

Like the party membership prohibition, SCR 60.06(2)(b) 4 is significantly underinclusive. It prohibits a judge from making *886 partisan endorsements while allowing her to accept campaign contributions from partisan groups, which creates at least as great of an effect on a candidate as an isolated endorsement. Robert B. Cialdini, *Influence* 19-51 (2001) (discussing studies showing that people feel psychological compulsion to return favors received, even when favor is uninvited or from someone disliked, and arguing that so-called "reciprocity rule" applies to campaign contributions).

In general, any concerns about bias in favor of the partisan candidate may be resolved easily through recusal in the highly unlikely event that a candidate

endorsed by a judge appears in the judge's court. Defendants say that recusal would be impractical because it would extend far beyond the particular candidate to anyone associated with that candidate. For example, defendants say that in the case of an endorsement of a candidate for governor, a judge would have to recuse himself from any case involving an administrative agency of the candidate he endorsed. That goes well beyond what ordinary principles of recusal would require. Using defendants' standard would mean that federal judges appear biased any time they sit on a case involving an agency of the President who appointed them. If that is so, there are few federal judges on the bench who have not been guilty of judicial misconduct.

In the case of local candidates, however, other concerns might arise. An endorsement of a candidate for sheriff or district attorney in a close and contentious race might make recusal necessary in so many cases that the state may be able to show a compelling interest in prohibiting such endorsements. *Wersal v. Sexton*, 2009 WL 279935, *10 (D.Minn. Feb. 4, 2009). I express no opinion on what form such a prohibition would have to take to pass constitutional muster other than to say that it must be shown to serve an identified compelling state interest.

Defendants cite a number of state court decisions that have upheld general restrictions on endorsements of partisan candidates by elected judges, but none is persuasive. Missing from these decisions is any attempt to explain how the restriction furthered interests in eliminating bias or why recusal could not meet the state's interest. *In the Matter of William A. Vincent,*

Jr., 143 N.M. 56, 172 P.3d 605, 608 (2007); *In re Raab*, 100 N.Y.2d 305, 763 N.Y.S.2d 213, 793 N.E.2d 1287, 1297 (2003); *In re Code of Judicial Conduct* (Canons 1, 2, and 7A(1)(b)), 603 So.2d 494, 497 (Fla.1992).

Accordingly I conclude that, like the prohibition on party membership, the present prohibition on all partisan endorsements cannot withstand strict scrutiny. That portion of SCR 60.06(2)(b) 4 violates the First Amendment.

C. SCR 60.06(4): Personal Solicitation

Under SCR 60.06(4),

> [a] judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions. A candidate may, however, establish a committee to solicit and accept lawful campaign contributions.... A judge or candidate for judicial office or judge-elect may serve on the committee but should avoid direct involvement with the committee's fundraising efforts. A judge or candidate for judicial office or judge-elect may appear at his or her own fundraising events.

Thus, like most other states with elected judges, Wisconsin does not prohibit judges and judicial candidates from fund raising, but instead requires all campaign solicitations to be made by a committee rather than by the candidate himself.

Again, defendants appear to agree with plaintiff that, like SCR 60.06(2)(b) 1 and 4, SCR 60.06(4) is

subject to strict scrutiny. *White II*, 416 F.3d at 764; *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir.2002). With respect to the asserted compelling interest for the rule, defendants do not attempt to justify it as necessary to preserve impartiality or public confidence in the judiciary. This may reflect a realization that a committee does little to counteract any perception that the public may have regarding improper donor influence, as several courts have recognized. *E.g., Weaver*, 309 F.3d at 1322; *Kansas Judicial Watch v. Stout*, 440 F.Supp.2d 1209, 1237 (D.Kan.2006); *Carey*, 2008 WL 4602786, at *15. Instead, defendants say that the restriction serves the interest "that no person feel directly or indirectly coerced by the presence of judges to contribute funds to judicial campaigns." Dfts.' Br. at 27, dkt. # 49.

The first question raised by defendants' reliance on this interest is whether it can be deemed "compelling" for the purpose of a strict scrutiny analysis. No one can doubt that the government has a compelling interest in stopping actual coercion from taking place, but SCR 60.06(4) goes well beyond that. It is somewhat peculiar to say that asking a question is an evil requiring government intervention, particularly in the context of a campaign that requires such questions to be asked. Although it may be true that it is harder to say no to a campaign request (or anything else) in a face-to-face confrontation, the parties agree that the meaning of "personally solicit" extends even to the judge's signature on a fund raising letter. Defendants point to no other context in which Wisconsin has determined that potential donors need this level of protection from a candidate and they do not suggest that judicial candi-

dates are uniquely predatory compared to others soliciting campaign contributions.

Defendants say that any comparison between judges and other types of political candidates "misses the mark" because the public "expects" legislators to be partisan. Dfts.' Reply Br. at 12, dkt. # 61. This response does not help defendants because it is related to an interest defendants are not relying on to justify the restriction. Defendants are relying solely on an interest in preventing a perception of coercion; they are not suggesting that personal solicitations are more likely than committee solicitations to convey partisan bias. It is difficult to see how they could make such an argument even if they wanted to.

Defendants may mean to say that a campaign solicitation from a judicial candidate is more coercive because of the possibility that the potential donor will find herself in that candidate's court after he is elected. If that is so, defendants give no reason to believe that the problem is solved by the use of campaign committees. As plaintiff and other courts have pointed out, a campaign committee does not stop a candidate from discovering who donated and who did not, rendering illusory any belief by the potential donor that he is freer to say no to the committee than to the candidate himself. *Weaver*, 309 F.3d at 1322-23; *Carey*, 2008 WL 4602786, at *16. Further, defendants provide no reason to believe that committees are any less coercive than candidates in practice. *E.g.*, Sara Mathias, *Am. Judicature Soc'y, Electing Justice: A Handbook of Judicial Election Reforms* 47, 54 (1990) (describing incident in which trial judge's campaign committee called President of Florida Bar Association one day before he was

scheduled to appear before judge, thanking him for his endorsement but noting that no check was enclosed with letter).

Defendants switch gears again when they quote Justice O'Connor's concern that "the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." Dfts.' Br. at 27, dkt. # 49 (*quoting White I*, 536 U.S. at 790, 122 S.Ct. 2528 (O'Connor, J., concurring)). Justice O'Connor's concern was not about a candidate's coercive effect on a potential donor, but a donor's potentially corrupting influence on the candidate. Moreover, her criticism was not of personal solicitations in particular but judicial fund raising generally. If defendants' worries are related to the effect of campaign contributions on the whole, the way in which a candidate makes requests for funds will not alleviate those fears. Only a system of public financing or a change in the method of judicial selection could do that.

Defendants cite *In re Dunleavy*, 838 A.2d 338 (Me.2003); *Stretton v. Disciplinary Bd. of Supreme Court of Pennsylvania*, 944 F.2d 137 (3d Cir.1991); and *In re Fadeley*, 310 Or. 548, 802 P.2d 31 (1990), each of which raises the similar concern that a personal solicitation will look more like a quid pro quo than a solicitation through a committee. Again, defendants' reliance on these cases is puzzling because they have not identified "appearances" as the reason for the restriction. In any event, the reasoning in these cases appears to be another example of failing to give the voters enough credit. Although lawyers are notorious for creating legal fictions, the public is more likely to

call a spade a spade. To the extent judicial fund raising undermines confidence in the judiciary, it is a result of judges' deciding cases involving those to whom the judge is financially indebted and may be again at the next election cycle. Neither defendants nor the cases they cite identify any reason to believe that voters are less suspicious of such a relationship simply because the contribution request is signed by the committee chairman rather than the candidate.

In the end, it appears that SCR 60.06(4) furthers no interest at all, except perhaps one of saving judicial candidates from the unseemly task of asking for money. *Stretton*, 944 F.2d at 145 (calling process of judicial fund raising "unseemly situation"). There is almost a nostalgic quality about it, harkening back to the days of early America when candidates for office thought it was in bad taste to campaign on their own behalf, instead letting their surrogates do all the dirty work. Joseph Ellis, *Founding Brothers* 174 (2002) (noting Thomas Jefferson as extreme example: when "Jefferson's candidacy for the presidency [in 1796] was common knowledge throughout the country, Jefferson claimed to be completely oblivious to the campaign on his behalf"). For a somewhat more cynical view, see Marie A. Failinger, *Can a Good Judge Be a Good Politician?*, 70 Mo. L.Rev. 433, 440-41 (Spring 2005) (noting view that many judicial ethical canons are "merely designed to enforce the upperclass virtue of politeness ... and protect a candidate from scrutiny").

Whatever the motivating force behind SCR 60.06(4), it does not pass constitutional muster. If defendants believe that some potential donors will feel coerced because they are likely to appear before that

judge, less restrictive (and more effective) responses would include limiting solicitations of those who are frequent litigants or requiring recusal when anyone who was solicited appears in that judge's court.

It cannot be denied that judicial campaigns have changed dramatically in recent years as a result of increased fund raising, a change that many judicial observers believe has not been for the better. E.g., Phyllis Williams Kotey, *Public Financing for Non-partisan Judicial Campaigns*, 38 Akron L.Rev. 597, 608 (2005) ("Campaigns that must be financed from funds raised by the candidate ... raise the dangers of actual quid pro quo arrangements or at least the appearance that the judge may be improperly influenced."). However, the problems created by costly and contentious judicial campaigns are left unaddressed by SCR 60.06(4). It too must fall as being inconsistent with the right to free speech.

D. Conclusion

As *White*, its progeny and this case demonstrate, it is no small task to determine the best way to promote judicial integrity. Regulatory bodies like the Wisconsin Judicial Commission must carefully weigh many competing factors in choosing a particular course, all the while being pulled in different directions by the candidates, the courts and the public. Despite the challenges, it does not follow that the government, the legal community and the general public should simply throw in the towel and adopt an "anything goes" approach.

Nor does it mean that states must abandon elections if they wish to have any meaningful influence

over judicial conduct. Although many in the legal community demonize judicial elections and exalt a system of appointment, a "merit" selection process has its own flaws and is no guarantee that the judiciary will be free from partisan bias or the perception of it. Cass R. Sunstein, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L.Rev. 301, 305 (2004) (in study of federal appellate decisions, concluding that "the political party of the appointing president is a fairly good predictor of how individual judges will vote" and that decisions are more extreme when panel is composed of three judges appointed by President of same party); Richard A. Posner, *Law Pragmatism and Democracy* 229 (2003) (discussing common perception that *Bush v. Gore* would have "come out the other way had the candidates' positions in the deadlock been reversed"). Even if it could be demonstrated that a nonelective selection process were superior, it is unlikely that the more than 30 states that use elections will abandon them any time soon.

In the wake of *White*, many reformers are advocating solutions that involve greater use of public financing, monitoring groups, voter guides, public evaluations of candidates by bar associations and even limited changes to the selection system that would allow voters to approve or disapprove a candidate immediately after appointment. *E.g.*, David B. Rottman, *Conduct and Its Oversight in Judicial Elections*, 21 Geo. J. Legal Ethics 1295 (2008); Ferris K. Nesheiwat, *Judicial Restraint*, 24 Quinnipiac L.Rev. 757, 787-88 (2006); Derek Bok, "Too Many Beholden Judges," 26 Nat'l L.J., at A8 (Nov. 25, 2002). Whatever route the government takes, it should be hesitant in

seeking to improve the judiciary by limiting the discussions that candidates may have with the public. Such measures not only risk violating the rights of the candidates and keeping voters ignorant, but "signal disrespect for the equality of citizens with their decision-makers" by assuming that voters must be protected from their own bad judgment. Failinger, *Can a Good Judge Be a Good Politician?*, 70 Mo. L.Rev. at 440-41. Thus, the best solutions are likely to involve attempts to enhance the dialogue, adding more voices rather than silencing the candidate. *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) (when government believes speech is offensive or misguided, "the remedy to be applied is more speech, not enforced silence"). Because the effect of SCR 60.06(2)(b) 1, 60.06(2)(b) 4 and 60.06(4) is to limit the discussion without providing any appreciable benefit in return, these canons violate the First Amendment and may not stand.

ORDER

IT IS ORDERED that

1. Plaintiff John Siefert's motion for summary judgment. dkt. # 31, is GRANTED; defendants' motion for summary judgment, dkt. # 48, is DENIED.

2. It is DECLARED that Wisconsin Supreme Court Rules 60.06(2)(b) 1, 60.06(4) and the prohibition on endorsing partisan candidates in 60.06(2)(b)4 are unconstitutional because they violate the First Amendment. Defendants James C. Alexander, Ginger Alden, Donald Leo Bach, John R. Dawson, David A. Hansher, Gregory A. Peterson, William Vander Loop, Michael R. Miller, James M. Haney and any future members of

the Wisconsin Judicial Commission are ENJOINED from enforcing these rules against plaintiff.

3. The clerk of court is directed to enter judgment in favor of plaintiff and close this case.

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JOHN SIEFERT,

Plaintiff-Appellant,

v.

JAMES C. ALEXANDER, IN HIS OFFICIAL CAPACITY AS THE CHAIRPERSON OF THE WISCONSIN JUDICIAL COMMISSION; ET AL.,

Defendants-Appellees.

[a complete list of Defendants is furnished in the Petition's Parties to Proceedings Section]

No. 09-1713

On Petition for Rehearing En Banc.

OPINION

PER CURIAM.

A majority of the judges in active service did not favor rehearing en banc, and the petition therefore is

denied.

Circuit Judges ROVNER, WOOD, WILLIAMS and HAMILTON voted to rehear the appeal en banc.

Circuit Judge SYKES did not participate in the consideration of this case.

ROVNER, Circuit Judge, with whom WOOD, WILLIAMS, and HAMILTON, Circuit Judges, join, dissenting.

As I noted in my dissent in the initial case before us in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir.2010), laws and regulations that restrict speech on the basis of content are subject to a strict scrutiny analysis, and when we tread on the core of those rights, for example, on speech about the qualifications of candidates for public office, we must do so with utmost caution. *Siefert*, 608 F.3d at 991. Nevertheless, in evaluating Wisconsin's Code of Judicial Conduct forbidding a judge or judicial candidate from publically endorsing or speaking on behalf of any partisan candidate (the portion of the opinion from which I dissented), the majority opinion applied a more relaxed balancing test not heretofore applied to the First Amendment rights of judges and judicial candidates.

When the Supreme Court evaluated the First Amendment rights of judges and judicial candidates in the seminal case of *Republican Party v. White*, 536 U.S. 765, 774-75 (2002), it did so through the lens of strict scrutiny (as did those justices writing in dissent). Every circuit court to follow has done the same. See *Wersal v. Sexton*, No. 09-1578, 2010 WL 2945171, at *3

(8th Cir. Jul. 29, 2010); *Carey v. Wolnitzek*, Nos. 08-6468, 08-6538, 2010 WL 2771866, at *6 (6th Cir.2010); *Republican Party v. White*, 416 F.3d 738, 749-50 (8th Cir.2005); *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir.2002). *See also Stretton v. Disciplinary Bd.*, 944 F.2d 137, 141 & n. 1 (3d Cir.1991).* Our decision in *Siefert* departs from the path carved by the Supreme Court and makes us an outlier among our sister circuits.

Furthermore, since the time this panel has issued its majority and dissenting opinions, both the Sixth and Eighth circuits have struck down as unconstitutional state statutes that restricted the First Amendment rights of judges and judicial candidates, including a Minnesota endorsement prohibition nearly identical to the one the majority opinion upheld in *Siefert*. *Wersal*, 2010 WL 2945171, at *8,*11. *See also Carey*, 2010 WL 2771866, at *17. Our divergent opinion on this issue is an outlier and should be reheard en banc. I respectfully dissent from the denial of rehearing en banc.

---

*In *Stretton*, a case that predated the Supreme Court's use of a strict scrutiny analysis in *Republican Party*, the Third Circuit applied a strict scrutiny analysis but declined to decide whether a less stringent standard might apply. *Id.* at 141 and n .1.

U.S. Const. amend. I (in relevant part)

Congress shall make no law . . . abridging the freedom of speech[.]

Wisconsin Supreme Court Rule 60.06(2)(b)

SCR 60.06 A judge or judicial candidate shall refrain from inappropriate political activity.

***

(2) Party membership and activities.

***

(b) No judge or candidate for judicial office or judge-elect may do any of the following:

1. Be a member of any political party.

2. Participate in the affairs, caucuses, promotions, platforms, endorsements, conventions, or activities of

a political party or of a candidate for partisan office.

3. Make or solicit financial or other contributions in support of a political party's causes or candidates.

4. Publicly endorse or speak on behalf of its candidates or platforms.

Wisconsin Supreme Court Rule 60.06(4)

(4) Solicitation and Acceptance of Campaign Contributions. A judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions. A candidate may, however, establish a committee to solicit and accept lawful campaign contributions. The committee is not prohibited from soliciting and accepting lawful campaign contributions from lawyers. A judge or candidate for judicial office or judge-elect may serve on the committee but should avoid direct involvement with the

committee's fundraising efforts. A judge or candidate for judicial office or judge-elect may appear at his or her own fundraising events. When the committee solicits or accepts a contribution, a judge or candidate for judicial office should also be mindful of the requirements of SCR 60.03 and 60.04(4).

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No. 10-405

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

THE HONORABLE JOHN SIEFERT,
Petitioner,

v.

JAMES C. ALEXANDER, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether Wisconsin's rule prohibiting judges and judicial candidates from making partisan political endorsements is an unlawful infringement of the First Amendment.

2. Whether Wisconsin's rule prohibiting judges and judicial candidates from personally soliciting campaign contributions is an unlawful infringement of the First Amendment.

LIST OF PARTIES

The Honorable John Siefert,

Petitioner

James C. Alexander, *in his official capacity as the Executive Director of the Wisconsin Judicial Commission*;

Larry Bussan, *in his official capacity as administrative assistant for the Wisconsin Judicial Commission*;

Ginger Alden, Michael J. Aprahamian, John R. Dawson, James M. Haney, Cynthia Herber, Michael R. Miller, Emily S. Mueller, Paul F. Reilly *all in their official capacities as members of the Wisconsin Judicial Commission*,

Respondents

Pursuant to Fed. R. Civ. P. 25(d)(1) and Wis. Stat. § 803.10(4)(a), respondents Aprahamian, Herber, Mueller, and Reilly are automatically substituted, by operation of law, in place of former respondents Donald Leo Bach, Jennifer Morales, David A. Hansher, Gregory A. Peterson and William Vander Loop.

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No. 10-405

In The

Supreme Court of the United States

THE HONORABLE JOHN SIEFERT,

Petitioner,

v.

JAMES C. ALEXANDER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

In this case, petitioner John Siefert ("Judge Siefert")—who has served as a circuit court judge in Milwaukee County, Wisconsin, since 1999—seeks to invalidate two provisions of Wisconsin's Code of Judicial Conduct—codified in Chapter 60 of the Wisconsin Supreme Court Rules ("SCR")—on the

ground that they unlawfully infringe his free speech rights under the First Amendment to the United States Constitution. The challenged provisions are: (1) Wisconsin's partisan endorsement clause—SCR 60.06(2)(b)(4)—which prohibits a judge or judicial candidate from publicly endorsing another person's candidacy for partisan political office; and (2) Wisconsin's personal solicitation clause—SCR 60.06(4)—which prohibits a judge or judicial candidate from personally soliciting or accepting contributions for the judge's own election campaign.

The case was commenced under 42 U.S.C. § 1983 in the United States District Court for the Western District of Wisconsin on March 3, 2008. The named defendants were the individual members of the Wisconsin Judicial Commission and its executive director (hereafter collectively referred to as "respondents" or "the Commission"). The Commission is statutorily charged, among other things, with investigating the possible misconduct of a Wisconsin judge, which includes any willful violation of the Code of Judicial Conduct. *See* Wis. Stat. §§ 757.81(4)(a) and 757.85.[1] In addition to the

---

[1]Under SCR 20:8.2(b), applicable provisions of the Code of Judicial Conduct apply not only to sitting judges, but also to judicial candidates who are lawyers but are not yet judges. Power to investigate misconduct by such candidates, however, resides not with the Commission, but with Wisconsin's Office of Lawyer Regulation, which is not a party in this case. *See* SCR 21.02.

endorsement and solicitation clauses already mentioned, the complaint also challenged the constitutionality of Wisconsin's party membership clause, which prohibited a judge or judicial candidate from being a member of a political party. SCR 60.06(2)(b)1.

On February 17, 2009, the District Court granted summary judgment in favor of Judge Siefert and final judgment was entered on February 23, 2009. *See Siefert v. Alexander*, 597 F.Supp.2d 860 (W.D. Wis. 2009). The effect of the decision was to enjoin the Commission from enforcing all three of the canons that had been challenged. *See id.* at 890.

Timely notice of appeal was filed by the Commission on March 18, 2009. The Seventh Circuit, on June 14, 2010, affirmed the invalidation of the party membership clause, but reversed the district court and upheld the validity of the endorsement and solicitation clauses. *Siefert v. Alexander*, 608 F.3d 974, 990 (7th Cir. 2010). Judgment was entered by the Seventh Circuit on August 31, 2010.

Judge Siefert filed a Petition for a Writ of Certiorari with this Court on September 22, 2010, seeking review of the Seventh Circuit's ruling on the endorsement and solicitation clauses. The Commission has not filed a cross-petition to challenge the Seventh Circuit's ruling on the party membership clause. In its present posture,

therefore, this case only involves the validity of the endorsement and solicitation clauses.

REASONS TO DENY THE PETITION

Independence and impartiality are cornerstones of an effective judiciary in a democracy. The concern for promoting and protecting these values dates back at least to our nation's founding, when Alexander Hamilton wrote that "the complete independence of the courts of justice is peculiarly essential in a limited Constitution." *The Federalist No. 78* at 466 (Clinton Rossiter ed., 1961). There is thus broad agreement that states have a compelling interest in employing judges who are actually impartial and that due process requires judges to be impartial. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927). This Court has also recognized that maintaining the public's perception that the courts are fair is a critical requirement of due process, going beyond the requirement that courts be fair in fact. *See Mistretta v. U.S.*, 488 U.S. 361, 407 (1989) ("[T]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *see also Cox v. State of Louisiana*, 379 U.S. 559, 565 (1965) (a state may protect against the possibility of public misperception that judicial action "did not flow only from the fair and orderly working of the judicial process."). For the courts, then, more than for the other branches of government, "it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism

and civil strife." *Bauer v. Shepard*, ___ F.3d ___, 2010 WL 3271960 at *8.

In the early and mid 19th century, the framers of many state constitutions were concerned about the potential threats to judicial independence posed by the pursuit of appointive office. Accordingly, between 1846 and 1860, numerous states, including Wisconsin, provided in their constitutions for popular election of judges. *See* Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 THE HISTORIAN 337 (1983); Wis. Const. art. VII, §§ 4 and 7. Proponents of popular election saw that practice as enhancing, rather than diminishing, the independence of the judicial branch of government. *Id.* at 343-45 and 349-50. In their view, the appointment of judges by governors or legislatures had led to the distribution of judgeships based on political service, rather than legal skill or judicial temperament. *Id.* at 347. That practice, they believed, was itself dangerous to judicial independence because it denied the judiciary its own claim to direct support from the sovereign people. *Id.* at 350.

The elective system was thus meant to insulate the judiciary from the control of the other branches of government by providing for direct popular support of judges. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AMERICAN JOURNAL OF LEGAL HISTORY 190, 205-06 (1993). This

view of the purpose of judicial elections was articulated in the constitutional debates in Wisconsin. *See Wagner v. Milwaukee County Election Com'n*, 2003 WI 103, ¶ 26, 263 Wis. 2d 709, 666 N.W.2d 816 (quoting Milo Quaife, *The Convention of 1846* (1919) at 287-88).

Judicial elections are thus different than elections for legislators and executive officials. Members of those "political" branches of government are expected to be representative of and responsive to the interests of their electoral constituencies, whereas judges—even when popularly elected—are not representative officials, but rather are expected to be impartial and independent in applying the rule of law. *See Chisom v. Roemer*, 501 U.S. 380, 400 (1991) ("[P]ublic opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment."). Whether judges are placed in office by appointment or by election, their role is the same: to decide individual cases based on what the law is, not what they think it should be.

Accordingly, states with judicial elections have addressed the fear that the sway of popular politics might itself endanger the independence of the judiciary by establishing constitutional devices designed to insulate elected judges from excessive political influence by, for example, providing for district rather than state-wide elections for lower courts, giving judges fixed terms of office during good behavior and longer terms for higher courts, and

making elected judges ineligible for other offices during the term for which they were elected. Hall, *The Judiciary on Trial*, 45 THE HISTORIAN at 352; *see also, e.g.*, Wis. Const. art. VII, §§ 1, 6-7, and 10; *Wagner*, 263 Wis. 2d 709, ¶¶ 27-28.

In addition to such insulating mechanisms, most jurisdictions, including Wisconsin, have established codes of judicial conduct that serve an important function in ensuring that public confidence in the judiciary is not undermined by the behavior of judges and judicial candidates. *See Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252, 2266 (2009) ("These codes of conduct serve to maintain the integrity of the judiciary and the rule of law."). Wisconsin's code of judicial conduct "governs judicial acts of a judge in his official capacity and certain personal conduct which interferes or appears to interfere with the proper performance of his judicial conduct." *In re Promulgation of a Code of Judicial Ethics*, 36 Wis. 2d 252, 254, 153 N.W.2d 873 (1967).

In the present case, Judge Siefert is not really seeking resolution of an actual and important conflict on a defined issue of constitutional law, but rather is asking the Court to strike out into new ground by broadly extending this Court's decision in *Republican Party of Minnesota v. White* ("*White I*"), 536 U.S. 765 (2002), in a way that would seriously erode the important differences between judicial elections and political branch elections. Whether to extend a prior decision of this Court into new

territory is certainly a question that can be addressed to this Court, but it is nonetheless one that ordinarily should not be taken up in this forum until such time as clearly conflicting alternative views have developed and have been carefully clarified and thoroughly studied in the lower courts. With regard to the claims raised here by Judge Siefert, that time has not yet arrived.

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *WHITE I*.

In deciding whether to grant review of a Circuit Court decision, this Court will consider whether the Circuit Court "has decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). Here, Judge Siefert contends that the Seventh Circuit decision for which review is sought conflicts with this Court's decision in *White I*, which held that the First Amendment was violated by a Minnesota judicial conduct canon that prohibited judges and judicial candidates from announcing their views on disputed legal and political issues. *Id.* at 788. Applying strict scrutiny, *White I* recognized a compelling state interest in preventing judicial bias for or against particular litigants, but nonetheless concluded that the challenged announce clause was not narrowly tailored to serve that interest. *Id.* at 776-77.

According to Judge Siefert, *White I* held that the First Amendment requires strict scrutiny of *all* restrictions on political speech by judges and judicial candidates. On that basis, he contends that the Seventh Circuit decision here conflicts with *White I* because it applied lower levels of scrutiny to Wisconsin's endorsement and solicitation clauses. *See Siefert*, 608 F.3d at 983-84 and 988-89.

Judge Siefert is incorrect, both because *White I* did not hold that the First Amendment requires strict scrutiny of all restrictions on judicial speech and because the announce clause at issue in *White I* is not materially similar to Wisconsin's endorsement and solicitation clauses.

A. *White I* Did Not Hold That the First Amendment Requires Strict Scrutiny of All Restrictions on Judicial Speech.

It is true that *White I* applied strict scrutiny to Minnesota's announce clause and noted that that clause restricted speech based on content and restricted core political speech. *See White I*, 536 U.S. at 774-75. *White I* did not, however, hold that the First Amendment requires campaigns for judicial office to be treated exactly the same as campaigns for political branch offices. *See id.* at 783. Rather, the parties in *White I* had all agreed that strict scrutiny was proper for the announce clause in that

case and the Court, accordingly, adopted that level of review without engaging in any analysis of the question of whether strict scrutiny would necessarily apply to regulations of other, different forms of judicial speech that did not prohibit the discussion of disputed legal and political issues by a judge or judicial candidate. *See id.*

On the contrary, the majority decision in *White I* disclaimed any intent to invalidate all restrictions on judicial campaign speech and expressly took no position on the validity of restrictions that were not before the Court in that case. *White I*, 536 U.S. at 770, 773 n. 5, and 783. *White I* thus left open the question of just how far the First Amendment allows states to go in regulating forms of political conduct by judges and judicial candidates other than the mere announcement of their positions on legal and political issues.

Moreover, Justice Kennedy, a member of the five-vote majority and author of a separate concurrence, expressly concluded that *White I* did not involve the validity of other restrictions on judicial speech and specifically left open the question of whether a different level of constitutional scrutiny could apply to restrictions on speech that is inconsistent with a judge's judicial function. *See id.* at 796 (Kennedy, J., concurring) ("This case does not present the question whether a State may restrict the speech of judges because they are judges"). "Nothing in the Court's opinion," he wrote, "should be read to cast doubt on the vital importance of" the

government's interest in "maintain[ing] the integrity of its judiciary." *Id.* at 793 (Kennedy, J., concurring). On the contrary, in Justice Kennedy's view, states are obligated to regulate the behavior of their judges in order to protect the integrity of their courts and state rules of judicial conduct are the necessary means by which states develop "independent-minded and faithful jurists." *Id.* at 794 (Kennedy, J., concurring).

Contrary to Judge Siefert's contention, then, *White I* did not hold that the First Amendment requires the automatic application of the same standard of constitutional scrutiny to all judicial conduct canons, but rather leaves courts free to take into account the interests that each individual canon serves and to recognize that different canons may merit different levels of scrutiny.

For similar reasons, this case also does not present the first of the Questions Presented suggested by Judge Siefert—*i.e.*, the question of whether the First Amendment uniformly requires strict scrutiny of all restrictions on judicial campaign speech. It is generally not appropriate for this Court to take a case merely for the purpose of resolving an abstract question about the general principles or legal standards to be used in a particular category of cases. *See* Eugene Gressman *et al.*, Supreme Court Practice, 241 (9th ed. 2007). What matters is whether the lower courts have decided the same legal issue in opposing ways under materially similar factual circumstances. *See id.* at 242.

Where review by this Court is warranted due to the existence of conflicting circuit court decisions regarding the constitutionality of a particular type of judicial canon, the Court will necessarily address the applicable legal standard in the course of determining that canon's validity. As shown in sections II and III of this brief, however, such review is not warranted in this case. Therefore, there is no valid justification for the Court to take this case merely in order to address abstract questions about the legal standards that may have been applied in a variety of distinguishable lower court decisions.

B. The Announce Clause At Issue In *White I* Is Not Materially Similar to Wisconsin's Endorsement or Solicitation Clauses.

The present case is also distinguishable from *White I* because it does not involve an announce clause and thus raises different issues than were before this Court in that case. Central to *White I* was the fact that communication of candidates' views on public issues enables voters to determine the qualifications of candidates for judicial office and to cast informed votes. *Id.* at 774. On that basis, the Court found the speech restricted by the announce clause to be "at the core of our First Amendment freedoms." *Id.* (citation and internal quotation marks omitted).

White I distinguished such speech about legal and political *issues*, however, from speech about potential *litigants*. Justice Scalia, writing for the Court, emphasized that the announce clause did "not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." *Id.* at 776 (original emphasis). A judge's preconceived views about particular litigants directly implicates the due process right to a fair trial. *Id.* at 775-76. In contrast, it is desirable for a judge to have considered views on legal issues. *Id.* at 777-78. Therefore, while judicial candidates must be able to announce their views on legal and political issues in order to conduct robust electoral campaigns, announcing views on individuals who may come before the judge in particular cases poses a threat to judicial impartiality.

The Wisconsin endorsement and solicitation clauses at issue in the present case are far more confined than was the announce clause in *White I* and, unlike that clause, do not inhibit either a candidate's ability to speak about or the public's opportunity to learn about the candidate's opinions on the various issues of the day and the candidate's qualifications and suitability for judicial office. Rather, consistent with *White I*, Wisconsin's endorsement and solicitations clauses are narrowly targeted at specific activities that create threats to judicial impartiality far greater than any threats that were created by the announce clause.

Accordingly, in the present case, the Seventh Circuit carefully analyzed the question of the proper level of constitutional scrutiny and correctly concluded that Wisconsin's endorsement and solicitation clauses regulate different forms of political speech that are more limited in communicative value and thus are entitled to a more deferential level of constitutional scrutiny than was the core political speech at issue in *White I*. *Siefert*, 608 F.3d at 983-84 and 988-89. That conclusion does not conflict with *White I* and does not warrant further review by this Court.

1. The endorsement clause.

Wisconsin's endorsement clause directly targets a single, narrowly defined political activity that is especially partisan in nature: an endorsement of another person's candidacy for partisan office. *See Wersal v. Sexton*, 613 F.3d 821, 849 (8th Cir. 2010) (Bye, J., dissenting) (Minnesota "endorsement clause targets precisely the speech most likely to implicate Minnesota's compelling interests."), *rehearing en banc granted* (Oct 15, 2010). A judge who endorses a partisan candidate does not thereby announce his own views on legal or political issues, but rather conveys a bias in favor of a particular individual who may come before the judge's court either in person or via an agent or other close associate. *See Siefert*, 608 F.3d at 983-84. The act of endorsement thus creates a danger that the judge will not be or appear impartial. *Wersal*, 613 F.3d at 847 (Bye, J.,

dissenting). There is a risk that the judge will harbor or appear to harbor a bias in favor of the endorsed candidate and those who associate with or support that candidate. *Id.* Equally important, there is a risk that the judge will harbor or appear to harbor a bias against political opponents of the endorsed candidate and those who support such opponents. *Id.* Because every partisan endorsement carries such a risk of bias, or the appearance of bias, the endorsement clause precisely targets a type of speech that is especially likely to implicate the state's compelling interest in maintaining judicial impartiality and the appearance of impartiality. *Id.* at 849.

In addition to eliminating the appearance of judicial bias with regard to specific individuals, the endorsement clause also serves to prevent judges from lending the prestige of judicial office to the advancement of someone else's partisan political interests, thereby assuming a role as a political power broker. *See Siefert*, 608 F.3d at 984. Without restrictions on this type of judicial conduct, "judicial candidates and judges-elect could elicit promises from elected officials, including local prosecutors and attorneys general, in exchange for their endorsement." *Id.* at 986 (citation and internal quotation marks omitted). "By moving past the role of mere participant in the political system to the role of political power broker trading on the currency of his position, a judge who gives political endorsements creates the appearance of a judicial branch beholden to political interests." *Wersal*, 613 F.3d at 847 (Bye, J., dissenting). Such direct

judicial involvement in the arena of partisan political pressures erodes the appearance of judicial impartiality and undercuts the state's compelling interest in maintaining both the appearance and the reality of a fair and neutral court system that is not embroiled in partisanship. *See* Charles G. Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 Geo. J. Legal Ethics 1259, 1267 (2008).

Although the endorsement clause is plainly aimed at restricting only speech that endorses particular candidates, Judge Siefert nonetheless reasons that, because a partisan endorsement may imply that the endorser shares the political views of the endorsee, restricting such endorsements amounts to restricting the expression of views on issues, in violation of *White I*. That is incorrect. If the mere presence of possible implied meanings were sufficient to transform speech about individuals into speech about issues for First Amendment purposes, then *White I*'s express distinction between those two forms of speech would be effectively nullified and rendered meaningless.

Furthermore, the suggestion that the endorsement clause somehow prevents judicial candidates from expressing their views on issues is simply wrong. If a judicial candidate wishes to convey that he has the same views on one or more issues as a candidate for partisan office, the judicial candidate need not endorse the partisan candidate as a proxy for those views, but rather is free to

announce the views directly. *Wersal v. Sexton*, 607 F.Supp.2d 1012, 1023 (D. Minn. 2009), *reversed by* 613 F.3d 821. The only thing the endorsement clause prevents the judicial candidate from doing is to endorse the election of the partisan candidate. Apart from the establishment of that particular political connection between endorser and endorsee, the entire universe of political speech remains freely available to the judicial candidate.

As the Seventh Circuit said: "An endorsement is a different form of speech that serves a purpose distinct from the speech at issue in *White I* . . . ." *Siefert*, 608 F.3d at 983. These distinctive characteristics justify a more deferential approach than strict scrutiny and the Seventh Circuit, accordingly, adopted the type of balancing analysis that had been suggested in Justice Kennedy's concurrence in *White I*. *Siefert*, 608 F.3d at 984-85. The Seventh Circuit's approach to the endorsement clause thus does not conflict with *White I* and does not warrant further review by this Court.

2. The solicitation clause.

Like the endorsement clause, the solicitation clause also differs from the announce clause in that it does not inhibit a judicial candidate's ability to communicate his views about public issues or his qualifications for office. Instead, the solicitation clause directly targets a particular financial transaction between a judicial candidate and a would-be campaign contributor by requiring that

transaction to be handled by a campaign committee, rather than by personal involvement of the candidate. *See* SCR 60.06(4) ("A candidate may . . . establish a committee to solicit and accept lawful campaign contributions.") *White I* addressed restrictions on judicial candidates' speech about legal and political issues, but did not deal with restrictions on the conduct of personally soliciting this type of financial transaction. This clearly distinguishes the solicitation clause at issue here from the announce clause that was invalidated in *White I*.

Furthermore, as with the endorsement clause, the specific conduct targeted by the solicitation clause poses heightened risks to both the appearance and reality of judicial impartiality:

> A contribution given directly to a judge, in response to a judge's personal solicitation of that contribution, carries with it both a greater potential for a quid pro quo and a greater appearance of a quid pro quo than a contribution given to the judge's campaign committee at the request of someone other than the judge, or in response to a mass mailing sent above the judge's signature.

Siefert, 608 F.3d at 989; *see also White I*, 536 U.S. at 790 (O'Connor, J., concurring) ("[T]he mere possibility that judges' decisions may be motivated

by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.").

It is precisely the act of asking for money one-on-one that creates the appearance of bias and "no matter what course of action the potential donor chooses, the appearance of judicial impartiality is diminished." *Wersal*, 613 F.3d at 853 (Bye, J., dissenting). As the Seventh Circuit aptly stated, "[a] direct solicitation closely links the quid-avoiding the judge's future disfavor-to the quo-the contribution." *Siefert*, 608 F.3d at 989. Accordingly, "the appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means." *Id.* at 989-90. As the Seventh Circuit has subsequently noted, *Siefert* recognized that personal solicitations create a "potential for actual or perceived mutual back scratching, or for retaliation against attorneys who decline to donate . . . ." *Bauer v. Shepard*, 2010 WL 3271960 at *4.

The prohibition on personal solicitation of campaign contributions also prevents a judge's personal reputation or the dignity of his office from being used in a way that—whether intentionally or not—would have a coercive effect on lawyers and potential litigants who might be asked to contribute to the judge's re-election campaign. *See Stretton v. Disciplinary Bd. of S. Ct. of PA.*, 944 F.2d 137, 146 (3rd Cir. 1991) ("[W]e cannot say that the state may not draw a line at the point where the coercive effect,

or its appearance, is at its most intense—personal solicitation by the candidate."). Such coercion not only harms the individuals who may be coerced into contributing, but also harms the reputation of the judiciary by directly connecting the person of the judge and the dignity of the judicial office with a financial transaction for the judge's personal political advantage. Even worse, the direct involvement of judges in such transactions may create the appearance in the eyes of the public that judges are willing to accept campaign contributions as payback for past favorable treatment in court or as consideration for future favorable treatment.

While it may be arguable whether a state has a truly compelling interest in preventing potential donors from feeling coerced, it cannot plausibly be denied that there is a compelling state interest in preventing the dignity of the judicial office from being misused in a coercive way that harms the judiciary's reputation for integrity and impartiality and has an interest in protecting the reputation of the judicial branch against the appearance of electoral corruption. The specific conduct regulated by the solicitation clause thus presents greater risks to judicial impartiality than did the conduct regulated by the announce clause in *White I*.

Because the solicitation clause does not restrict the amount or manner in which a judicial candidate can raise or spend campaign funds for the purpose of communicating the candidate's views on issues or qualifications, the Seventh Circuit correctly found

that the clause need not be subject to strict scrutiny. *Siefert*, 608 F.3d at 988; *see also Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam) ("A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.").

Such a restriction on the way campaign funds are raised, the Seventh Circuit reasoned, is really a campaign finance regulation, akin to the regulation of campaign contribution limits, which are reviewed under the framework of intermediate or closely drawn scrutiny set forth in *Buckley*. *Siefert*, 608 F.3d at 988 (citing *Buckley*, 424 U.S. at 96). Although the solicitation clause regulates the solicitation of money, rather than the giving or receipt of money at issue in *Buckley*, the Seventh Circuit observed that this Court has extended the anti-corruption rationale recognized in *Buckley* to other federal-law bans on solicitations by candidates or office holders. *Id.* (citing *McConnell v. Federal Election Com'n*, 540 U.S. 93, 136-38 & n. 40, *overruled in part on other grounds by Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876 (2010)). Therefore, as with the endorsement clause, the Seventh Circuit's approach to the solicitation clause likewise does not conflict with *White I* and does not warrant further review by this Court.

II. THERE IS NO CIRCUIT CONFLICT JUSTIFYING REVIEW OF WISCONSIN'S ENDORSEMENT CLAUSE.

In deciding whether to grant review of a Circuit Court decision, this Court will also consider whether the Circuit Court "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]" Sup. Ct. Rule 10(a). Here, Judge Siefert contends that the Seventh Circuit's decision regarding Wisconsin's endorsement clause conflicts with the Eighth Circuit's decision in *Wersal v. Sexton*, 613 F.3d 821 (8th Cir. 2010), *rehearing en banc granted* (Oct 15, 2010). In that case, a divided panel of the Eighth Circuit applied strict scrutiny and invalidated a Minnesota endorsement clause that, similar to Wisconsin's clause, prohibited judges and judicial candidates from endorsing or opposing candidates for other offices. *See id.* at 833-38.

The Eighth Circuit, however, has granted a petition for *en banc* rehearing of the *Wersal* case. The *Wersal* panel decision on which Judge Siefert relies, therefore, has been vacated pending the *en banc* review.[2] Accordingly, the purported conflict between the present case and *Wersal* no longer exists. Furthermore, apart from the now-vacated panel decision in *Wersal*, other state and federal

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[2]Oral argument in the *en banc* rehearing took place on January 10, 2011.

courts have not split on the constitutionality of restrictions on political endorsements by judges, but rather have uniformly upheld them. *See In re Matter of William A. Vincent, Jr.*, 172 P.3d 605, 606, 608-09 (N.M. 2007); *In re Matter of Ira J. Raab*, 793 NE.2d 1287, 1292 (N.Y. 2003)); *In re Code of Judicial Conduct (Canons 1, 2, and 7A(1)(b))*, 603 So.2d 494, 497-98 (Fla. 1992); *Yost v. Stout*, No. 06-4122-JAR, slip op. at 12 (D. Kan. Nov. 16, 2008).

Moreover, even if the *Wersal* panel decision had not been vacated, it still would not conflict with the Seventh Circuit's decision here in a way that would warrant review by this Court. First, the *Wersal* panel majority, in choosing to apply strict scrutiny to Minnesota's endorsement clause failed to consider the Seventh Circuit's views regarding the applicability of the more deferential standard used to evaluate restrictions on political activities by government employees that interfere with the effective performance of governmental functions. *See Siefert*, 608 F.3d at 984. Nor did the panel majority discuss or cite *Pickering v. Board of Ed. of TP. H.S. Dist. 205, Ill.*, 391 U.S. 563 (1968); *United States C. Serv. Com'n v. National Ass'n of Let. Car.*, 413 U.S. 548 (1973); or any of the other decisions of this Court concerning such restrictions on public employees' political activities. *See Bauer*, 2010 WL 3271960 at *8. The *Wersal* panel decision, therefore, does not reflect sufficiently close study of the applicable level of scrutiny to warrant review of that issue by this Court at the present time.

Second, in invalidating Minnesota's endorsement clause, the *Wersal* panel majority reasoned that an endorsement may be a "proxy for expressing [the candidate's] views" and therefore must be invalidated because it restricts speech for or against particular *issues* rather than speech for or against particular *parties*. *Wersal*, 613 F.3d at 835. As has already been shown in section I.B.1 above, however, that view of endorsements is itself inconsistent with *White I*'s express distinction between speech about issues and speech about litigants. *See White I*, 536 U.S. at 775-78. A conflict between a decision of the Eighth Circuit and a decision of this Court, might provide a reason for this Court to review the Eighth Circuit decision, but it is not a reason for this Court to review a Seventh Circuit decision that is itself consistent with Supreme Court precedent. In any event, this tension between *White I* and the *Wersal* panel decision may be one of the matters the Eight Circuit will address in the anticipated *Wersal en banc* decision. At the present time, however, this issue is not sufficiently developed to be in the best posture for consideration by this Court.

Third, the *Wersal* panel also found Minnesota's endorsement clause to be overbroad because it supposedly prevents endorsements of people who are unlikely to appear as litigants in the endorser's court, such as candidates from other states. *Wersal*, 613 F.3d at 835-36. As the Seventh Circuit has noted, however, "[l]aws need not contain exceptions for every possible situation in which the reasons for

their enactment are not present" because "[i]t is the nature of rules to be broader than necessary in some respects." *Bauer*, 2010 WL 3271960 at *4. Accordingly, this Court has held that a law will not be facially invalidated unless its overbreadth is not only real, but also is a substantial concern when judged in relation to the legitimate sweep of the statute as a whole. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 and 616 n. 4 (1973). In *Wersal*, the panel reached the conclusion that the Minnesota endorsement clause was fatally overinclusive, without specifically determining the substantiality of its overbreadth in relation to its legitimate sweep, as required under *Broadrick* and its progeny. *See Wersal*, 613 F.3d at 835. Once again, the failure of the *Wersal* panel to give proper weight to this Court's precedent hardly provides a reason for the Court to grant review of the present case.

In any event, Judge Siefert's parallel allegations of overbreadth in this case are themselves without merit. He indicates that he wished to endorse then-Senator Barack Obama's presidential candidacy and suggests that Wisconsin's endorsement clause is overinclusive to the extent that it prohibited such an endorsement, because Obama would be unlikely to appear as a litigant before him. That suggestion, however, is incorrect. Candidates for the national office of the presidency appear on electoral ballots in every state and thus may appear as litigants in election-related disputes in virtually any court in the nation.

For example, following the November 2000 presidential election, both Al Gore and George W. Bush appeared as litigants before a Florida circuit court, the Florida Supreme Court, and before this Court in litigation that ultimately determined the outcome of the national election. *See Bush v. Gore*, 531 U.S. 98 (2000) *reversing, Gore v. Harris*, 772 So.2d 1243 (Fla. 2000) *reversing, Gore v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4, 2000). A case with such great political consequences inevitably threatens to undermine public confidence in the impartiality of the judiciary. In the litigation regarding the 2000 election, however, the judges involved in the Florida court proceedings had been prohibited from publicly endorsing or opposing either presidential candidate by Canon 7 of the Florida Code of Judicial Conduct. Likewise, the Justices of this Court had been prohibited from making such endorsements by Canon 5 of the Code of Conduct for United States Judges. It is disconcerting to contemplate the scope and depth of the damage to the appearance of judicial impartiality that might have been caused by such a case in the absence of those salutary restrictions on political endorsements by judges. Judge Siefert's suggestion that a presidential endorsement by a Wisconsin judicial candidate would not implicate the state's compelling interest in maintaining the reality and appearance of judicial impartiality is thus without merit.

Finally, the Seventh Circuit's decision regarding Wisconsin's endorsement clause also does not

conflict with *Republican Party of Minnesota v. White* ("*White II*"), 416 F.3d 738 (8th Cir. 2005), as Judge Siefert suggests. *White II* held that a judicial candidate must be allowed to associate with political parties and to engage in certain limited forms of solicitation of campaign contributions, but it did not address endorsements by judges, nor did it consider how such a political relationship between a judge and individual partisan candidates could affect the appearance of judicial impartiality or undermine public confidence in the judiciary. There is thus no direct conflict between the present case and *White II* regarding the constitutionality of a prohibition on partisan judicial endorsements.

It is true that *White II* did apply strict scrutiny to the canons at issue in that case and discussed the standard of review in terms which suggest that strict scrutiny could be uniformly applicable to all canons that restrict any political speech by judges or judicial candidates. *Id.* at 748-49. Nonetheless, in the absence of any considered analysis in *White II* of why strict scrutiny should or should not apply to an endorsement clause, any tension between that case and the Seventh Circuit's analysis of the issue in this case remains abstract. Moreover, in light of the pending *en banc* decision in *Wersal*, it is possible that the Eighth Circuit could be on the verge of reconsidering some or all of its prior legal analysis in *White II*, or at least of clarifying that analysis in light of the intervening legal analysis by the Seventh Circuit in the present case. Under these circumstances, it makes sense for this Court to

postpone review of the constitutionality of restrictions on judicial endorsements until it has the benefit of the full Eighth Circuit's further study of the issues.

III. LIMITED INTER-CIRCUIT TENSION RELATED TO THE CONSTITUTIONALITY OF WISCONSIN'S SOLICITATION CLAUSE IS INSUFFICIENT TO WARRANT REVIEW BY THIS COURT.

Judge Siefert also contends that the Seventh Circuit's decision regarding Wisconsin's solicitation clause—and, in particular, the adoption of a level of review lower than strict scrutiny—conflicts with decisions from the Sixth, Eighth, and Eleventh Circuits. *See Carey v. Wolnitzek*, 614 F.3d 189, 204-07 (6th Cir. 2010); *White II*, 416 F.3d 738, 763-66 (8th Cir. 2005); *Wersal*, 613 F.3d 821, 838-41 (8th Cir. 2010); and *Weaver v. Bonner*, 309 F.3d 1312, 1322-23 (11th Cir. 2002). That contention, however, overlooks the fact that, "[t]o justify a grant of certiorari, the conflict must truly be direct and must be readily apparent from the lower court's rationale or result." Gressman, Supreme Court Practice, 250 (citing *U.S. v. Bass*, 536 U.S. 862, 864 (2002) and *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997)). Here, the purported conflicts to which Judge Siefert points either do not exist or, where there is some real tension, it is not clear and direct, but rather is presented in an

abstract or indirect fashion that is not optimal for consideration by this Court.

A. The Difference in Levels of Scrutiny Applied to Solicitation Clauses in Different Federal Circuits Does Not Warrant Review by This Court.

Judge Siefert first points to the fact that the Sixth, Eighth, and Eleventh Circuits all have applied strict scrutiny to bans on political solicitations by judicial candidates in Kentucky, Minnesota, and Georgia, respectively, whereas the Seventh Circuit, in this case, applied closely drawn scrutiny to Wisconsin's solicitation clause. According to Judge Siefert, the Court should take this case in order to review that inter-circuit conflict regarding the applicable level of constitutional scrutiny. Contrary to Judge Siefert's suggestion, however, this issue has not been sufficiently developed in the lower courts to merit review by this Court at the present time.

In the present case, the Seventh Circuit based its reasoning on the fact that a ban on the direct, personal solicitation of campaign contributions by a judicial candidate does not prevent such a candidate from expressing his own views on public issues or his qualifications for office, and does not restrict the amount or manner in which a judicial candidate can raise or spend campaign funds for the purpose of

communicating his views on issues or qualifications. *Siefert*, 608 F.3d at 988. On that basis, the Seventh Circuit concluded that Wisconsin's solicitation clause did not directly burden political speech in a way that would require strict scrutiny. *Id.* Instead, the Seventh Circuit found that the solicitation clause is really a restriction on the way campaign funds are raised and thus is analogous to the kind of contribution-related speech that *Buckley* held was entitled to closely drawn scrutiny, rather than strict scrutiny. *See Siefert*, 608 F.3d at 988 (citing *Buckley*, 424 U.S. at 20-21, 25).

In contrast, the Sixth, Eighth, and Eleventh Circuits all very quickly concluded that personal solicitations are core political speech entitled to strict scrutiny, while engaging in little or no analysis to support that conclusion as applied to personal solicitations and while giving little or no consideration to the kind of alternative view of personal solicitations that was discussed by the Seventh Circuit in this case. *See Carey*, 614 F.3d at 198-200; *White II*, 416 F.3d at 748-49; *Wersal*, 613 F.3d at 831-32; *Weaver*, 309 F.3d at 1319.[3] Because those circuits have not fully considered the aspects of personal solicitation speech analyzed by the Seventh Circuit, their decisions on this issue do

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[3]The Sixth Circuit did briefly consider and reject application of closely drawn scrutiny based on an analogy to other fundraising regulations, but even that decision did not specifically discuss or consider the Seventh Circuit's use of the rejected approach. *Carey*, 614 F.3d at 200.

not directly conflict with the Seventh Circuit's in a way that would be ripe for review by this Court. The question of what level of scrutiny should apply to personal solicitations by judicial candidates, therefore, still could benefit from further study in the lower courts before it is taken up by this Court.

B. Any Conflict in Different Circuits Regarding the Validity of Solicitation Clauses Is Not Sufficiently Clear and Direct or Sufficiently Developed to Warrant Review by This Court.

1. Sixth Circuit

The most recent conflicting decision to which Judge Siefert points is *Carey*, 614 F.3d 189 (6th Cir. 2010), in which the Sixth Circuit struck down three Kentucky judicial canons, including one that prohibited judicial candidates from personally soliciting or accepting campaign contributions. Applying strict scrutiny, the Court concluded that the Kentucky solicitation clause was not narrowly tailored to advance the state's compelling interest in preventing judicial bias for or against a litigant. *Id.* at 204-06. In particular, the Court found the solicitation clause to be overinclusive because it not only prohibited in-person solicitations and solicitations of people with pending court cases, but also prohibited speeches to large groups and signed

mass mailings. *Id.* at 205. The Court specifically reserved judgment on the question of whether the First Amendment would permit a narrower ban on in-person solicitations and solicitations of people with pending cases, but nonetheless invalidated the Kentucky solicitation clause in its entirety based on a finding of facial overbreadth. *Id.* at 206-07.

Because *Carey* facially invalidated a solicitation clause similar to Wisconsin's, that decision clearly is in tension with the Seventh Circuit's decision in the present case. Nevertheless, the two decisions are, to a certain degree, distinguishable and/or reconcilable.

Carey's analysis of the Kentucky solicitation ban focused on its invalidity as applied to solicitations made through speeches to large groups and signed mass mailings. In doing so, the Sixth Circuit expressly distinguished the present case, noting that the Seventh Circuit's decision in *Siefert* "focused on the problems associated with 'direct' solicitation and did not consider the validity of applying the canon to mass mailings and group solicitations—the most troubling scenarios here." *Carey*, 614 F.3d at 206. In contrast, *Carey* expressly did not decide the constitutionality of a solicitation clause "focused on one-on-one solicitations or solicitations from individuals with cases pending before the court . . . ." *Id.* As the Seventh Circuit subsequently observed, *Carey* "did not question the propriety of limits on in-person solicitation, where the possibility of reward or retaliation is greatest, but concluded that Kentucky's rule is substantially overbroad because it

covers solicitation by mass mailing." *Bauer*, 2010 WL 3271960 at *5.[4]

Any conflict between *Carey* and the present case, therefore, is partial and does not include a conflict regarding the heart of Wisconsin's solicitation clause—*i.e.*, its ban on those direct personal solicitations that pose the greatest and most immediate threat to the reality and appearance of impartiality. *Carey* thus does not present the kind of square, direct conflict that would warrant review by this Court. Moreover, because the Sixth and Seventh Circuits have not analyzed the Kentucky and Wisconsin solicitation clauses in relation to comparable factual situations, there is comparatively little risk that allowing the limited conflict between the *Carey* and *Siefert* decision to continue, pending further study in the lower courts, will lead to any serious lack of uniformity in the practical application of solicitation canons in different parts of the country.

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[4]Accordingly, an Ohio district court recently found that Ohio's solicitation clause, which contains exceptions for mass mailings and group solicitations, would probably be upheld under *Carey*. *See Ohio Council 8 American Fed'n of State, County, and Mun. Employees, AFL-CIO v. Brunner*, No. 1:10-cv-503, slip op. at 16-17 (S.D. Ohio Aug. 19, 2010) (finding that plaintiffs had not established probability of success entitling them to preliminary injunction).

2. Eighth Circuit

Judge Siefert also points to alleged conflicts between the Seventh Circuit's treatment of Wisconsin's solicitation clause and the Eighth Circuit's decisions in *White II* and *Wersal*. Once again, however, these purported conflicts either do not exist or are not clear and direct enough to warrant review by this Court.

a. *White II*

In *White II*, the Eighth Circuit, applying strict scrutiny, held that "[k]eeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case." *White II*, 416 F.3d at 765. The Court nonetheless found that the solicitation clause was not narrowly tailored to that compelling interest to the extent that it prohibited candidates from soliciting contributions from large groups and transmitting personally-signed solicitation messages through campaign committees. *Id.* at 764-66. *White II* did not, however, hold that direct personal solicitations—as opposed to blanket solicitations—could not be restricted in order to protect judicial impartiality.

White II thus is not in direct conflict with the Seventh Circuit decision here because, as noted above, the issue in *White II* was not the validity of restrictions on direct, in-person solicitations by

judicial candidates, but rather was the validity of restrictions on blanket solicitations made by letter or speeches to large groups. Accordingly, *White II*, like *Carey* and for similar reasons, does not present the kind of direct conflict with the present case that would justify review by this Court.

b. Wersal

Following *White II*, Minnesota revised its solicitation clause to permit blanket solicitations made by letter or speeches to large groups, thereby addressing the problems that had been identified by the Eighth Circuit. The revised solicitation clause was again challenged in *Wersal*, 613 F.3d at 839. Again applying strict scrutiny, a divided panel of the Eighth Circuit this time struck down the clause in its entirety, concluding that, even with regard to direct, in-person solicitations, it was not narrowly tailored to serve the state's compelling interest in protecting judicial impartiality. *Id.* at 839-41.

As previously discussed, however, the *Wersal* panel decision has been vacated pending *en banc* review by the Eighth Circuit. At the present time, therefore, there is no conflict between *Wersal* and the present case that would warrant review by this Court. Moreover, the pending *en banc* review in *Wersal* equally negates any possible need to review this case in light of *White II*. Whatever tension may exist between the Seventh Circuit decision here and *White II* (or any other Eighth Circuit decisions) can be fully worked out in the *Wersal en banc*

proceeding, where the full Eighth Circuit can reverse circuit precedent, if it deems such action appropriate. Under these circumstances, it makes sense for this Court not to take up the issue of the constitutionality of direct solicitation bans until that issue has been more thoroughly considered in the lower courts.

3. Eleventh Circuit

The final conflicting decision to which Judge Siefert points is *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), in which the Eleventh Circuit invalidated a Georgia solicitation canon that prohibited judicial candidates from personally soliciting campaign contributions or personally soliciting public statements of political support.

While it cannot be denied that *Weaver* did invalidate a ban on direct, in-person solicitation by judicial candidates, the Georgia provision is nonetheless distinguishable from Wisconsin's solicitation clause because, unlike the latter, it applied not only to financial solicitations, but also to solicitations of statements of public support for the judicial candidate. *See Weaver*, 309 F.3d at 1315. The *Weaver* court's analysis did not differentiate between these two aspects of the Georgia solicitation clause, but treated that clause as a whole. *See id.* at 1322-23. Speech by a judicial candidate soliciting a public statement of support for his own candidacy however, is more closely related to speech about the

judicial candidate's own views and qualifications than is speech that only solicits a financial contribution. Accordingly, a higher level of scrutiny was more appropriate for Georgia's clause than is appropriate for Wisconsin's clause, which regulates only a financial transaction. It thus remains unclear whether the Eleventh Circuit would have applied the same analysis or reached the same result if it's solicitation clause, like Wisconsin's, had dealt only with financial solicitations. For this reason, too, the conflict between *Weaver* and the present case, like the other conflicts to which Judge Siefert points, is not sufficiently clear and direct to warrant review by this Court at the present time.

IV. THIS CASE DOES NOT PRESENT ANY AS-APPLIED CLAIMS THAT MERIT REVIEW BY THIS COURT.

Judge Siefert also asks the Court to grant review of his as-applied challenges to the endorsement and solicitation clauses. More specifically, he asks the Court to consider whether the endorsement clause is constitutional as applied to a judicial endorsement of a candidate for President of the United States and whether the solicitation clause is constitutional as applied to personal phone calls, signing fundraising letters, and personally inviting potential donors to fundraisers. Judge Siefert's Petition, however, fails to provide any reason why those as-applied claims are well-postured for review by this Court or why

consideration of those claims would advance or clarify important questions of law.

In his appellate brief before the Seventh Circuit, Judge Siefert asserted that both the endorsement clause and the solicitation clause were unconstitutional both facially and as applied to himself. That brief, however, did not separately argue or develop either of those as-applied claims in a way that was analytically distinct from the facial claims. Accordingly, the Seventh Circuit's decision facially upheld both clauses without separately or specifically analyzing or deciding any as-applied claims. *See Siefert*, 608 F.3d at 983-90. In the absence of full and complete development and analysis, those as-applied claims do not merit review by this Court.

For example, the application of the endorsement clause to an endorsement of a presidential candidate has not been developed in a way analytically distinct from the more general argument that the clause is facially overinclusive because it allegedly prohibits endorsements of persons unlikely to appear as litigants before the endorser. Likewise, with regard to the solicitation clause, Judge Siefert has not provided any analysis explaining why the application of that clause to *in-person* telephone solicitations or *personal* invitations to fundraising events would differ in any meaningful way from any other application of the clause to *direct, personal* solicitations. To the extent that these applications of the endorsement and solicitation clauses thus

collapse into the general consideration of their facial validity, the as-applied claims do not warrant separate attention from this Court.

As to the application of the solicitation clause to the signing of fundraising letters, there arguably could be a meaningful distinction between restricting direct, personal solicitations and restricting solicitations made through *mass mailing* of a fundraising letter containing the personal signature of a judicial candidate. *See Carey*, 614 F.3d at 205-06. Judge Siefert, however, has not argued this case in a way that adequately clarifies the potentially significant difference between such mass mailings and mailings of *personal* solicitation letters signed by a judicial candidate, nor did the Seventh Circuit discuss the latter distinction in the decision for which review is sought.

For all of these reasons, Judge Siefert's as-applied claims have not been sufficiently developed or analyzed to make them an appropriate vehicle for this Court's primary task of clarifying important issues of federal law on which a uniform interpretation is needed.

CONCLUSION

For all of the reasons discussed herein, the Court should deny Judge Siefert's Petition for a Writ of Certiorari. In the alternative, if the Court decides to grant the Petition, it should restate the questions presented as set forth herein.

Dated this 30th day of March 2011.

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No. 10-405

In The
Supreme Court of the United States

THE HONORABLE JOHN SIEFERT, *Petitioner,*

v.

JAMES C. ALEXANDER, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Reply In Support of Petition for a Writ of Certiorari

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Reply to Respondents' Brief in Opposition

I. The Seventh Circuit's Decision Conflicts With This Court's Jurisprudence.

Respondents contend that the decision below is not in conflict with this Court's decision in *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002) ("*White I*") because *White I* did not establish strict scrutiny as the standard of review for all judicial regulations. Resp. at 9-12. Specifically, they argue that strict scrutiny is the standard only for the announce clause and not for the endorsement or personal solicitation clauses. Resp. at 12-14.

Respondents are not the first to assert this argument. Most recently, the Sixth Circuit in *Carey v. Wolnitzek,* 614 F.3d 189 (6th Cir. 2010), addressed and rejected this argument. The *Carey* court observed that the *White I* court's brevity on the matter of the standard of review "may suggest . . . that the counter-argument has little to support it." *Id.* at 198. It went on to point out that "[n]ot one of the Justices, not even one of the dissenters, objected to the application of strict scrutiny." *Id.* at 198. There would have been very little purpose for the Supreme Court to review the *White I* case if it was not to establish the standard of review and proper analysis for judicial canons. *Id.* at 198.

Even if *White I* itself were silent on the appropriate standard of review in this case, this Court's jurisprudence plainly points to strict scrutiny. As Judge Rovner discusses in her dissent, "[l]aws and regulations that restrict speech on the basis of content are subject to the high hurdle of the strict scrutiny test." App. at 33a. *See also Carey,* 614 F.3d at 199

(discussing this Court's consistent application of strict scrutiny to content-based speech restrictions). These laws are presumed invalid unless the government can rebut that presumption by demonstrating that the regulations at issue are narrowly tailored to serve a compelling interest. App. at 33a-34a (*citing United States v. Stevens,* 130 S. Ct. 1577, 1584 (2010); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989). This Court has carved out exceptions to this rule in the case of obcenity, defamation, fraud, incitement, and speech integral to criminal conduct, *see Stevens,* 130 S.Ct. at 1584, but none of these apply to or encompass judicial candidates' speech. App. at 34a. The *White I* court's application of strict scrutiny to a content-based judicial speech regulation was the logical extension of this well-established legal standard that should have been employed by the Seventh Circuit in this case, as well. That the Seventh Circuit chose to instead apply the *Pickering/Letter Carriers* balancing test—used for non-candidate government employees—to the endorsement clause and *Buckley*'s closer drawn scrutiny—used for campaign contribution regulations—to the personal solicitation clause is in direct conflict with this Court's jurisprudence.

II. A Conflict Among The Circuits Remains.

Allowing the Seventh Circuit's standards of review to remain good law also prevents uniformity among the circuits because those circuits that have reviewed judicial canons have consistently applied strict scrutiny to them. *See Carey,* 614 F.3d 189 (striking down a personal solicitation clause and party affiliation clause under strict scrutiny); *Republican*

Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005) ("*White II*") (striking down a partisan activities clause and a solicitation clause under strict scrutiny); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (striking down a solicitation clause and a false statement clause under strict scrutiny); *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d 1991) (upholding the announce clause under strict scrutiny).

It is true that the only circuit that has reviewed and struck down the endorsement clause is the Eighth Circuit in *Wersal v. Sexton*, 613 F.3d 821 (8th Cir. 2010), which was vacated and has en banc review pending. But Respondents read too much into that en banc review, asserting it removes any circuit split on the constitutionality of the endorsement clause, with that court now having the opportunity to apply the Seventh Circuit's alternative standards. Resp. at 22-23. The Eighth Circuit has already, in its en banc *White II* decision, established strict scrutiny as its standard of review for judicial canons. *White II*, 416 U.S. at 749 ("Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail [political speech]"). And the Eighth Circuit has previously reviewed and expressly dismissed the application of the balancing test used for regulation of government employees to judicial canons even before the *White I* case was resolved. *See Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 864 (8th Cir. 2001), *reversed by White I*, 536 U.S. 765. In *Kelly*, the Eighth Circuit held that the judicial canons challenged there were

> different from the Hatch Act provisions challenged in *Letter Carriers* because, while

> the Hatch Act restrained political activity of government employees, Canon 5 restrains the activity of candidates engaged in an election contest. . . . the public's interest in free speech is greater where the person subject to restrictions is a candidate for public office, about whom the public is obliged to inform itself. Therefore, we will invoke strict scrutiny and examine the restrictions at issue to determine whether they are narrowly tailored to serve a compelling state interest.

Kelly, 247 F.3d at 864. This seems to suggest a long-standing inclination on the part of the Eighth Circuit to apply strict scrutiny to judicial speech regulations and an unlikelihood that the *Wersal* en banc court's ruling will prevent a conflict with the Seventh Circuit by adopting using a balancing test as the standard of review for the endorsement clause.

But whatever the outcome of *Wersal*, the larger issue involved in both this case and *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010), would remain unresolved: whether strict scrutiny uniformly applies to review of judicial campaign speech regulations. Pet. Br. at 5-8.

In her dissent from the denial of en banc review in this case, Judge Rovner observed that the Seventh Circuit's use of a different standard of review made this case an outlier among the federal circuits. App. at 109a. Moreover, she pointed out that the outcome of recent federal circuits' review under the strict scrutiny standard was to strike down the challenged canons under the First Amendment. Id. (citing Wersal, 613 F.3d 821 (8th Cir. 2010) (striking down a solicitation clause and an endorsement clause under strict

scrutiny)(en banc review granted)); Carey, 614 F.3d 189 (striking down a personal solicitation clause and party affiliation clause under strict scrutiny); White II, 416 F.3d 738 (striking down a partisan activities clause and a solicitation clause under strict scrutiny); Weaver, 309 F.3d 1312 (striking down a solicitation clause and a false statement clause under strict scrutiny); Stretton, 944 F.2d 137 (3d 1991) (upholding the announce clause under strict scrutiny). Given the outcome determinative nature of applying the correct standard of review, correcting the Seventh Circuit's novel approach to bring it in line with the remaining circuits would reestablish uniformity among the federal courts. Supreme Court review is warranted.

Respondents attempt to distinguish the personal solicitation clause cases by emphasizing the factual disparities that gave rise to each circuit court's facial concerns that rendered the clauses unconstitutional.[1] Resp. at 31-37. All of these cases involved broad, facial challenges to identical or substantially similar personal solicitation clauses. The Eighth Circuit struck Minnesota's personal solicitation clause as insufficiently tailored because candidates could not

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[1]Respondents also argue that no as-applied challenges are properly before this Court. To preclude Petitioner from raising as-applied challenges seems disingenuous given Respondents' efforts to distinguish the relevance and applicability of the personal solicitation clause cases based on their facts. But in any event, while an as-applied challenge has not been Petitioner's primary focus, he both pled it in his complaint and argued it in his briefing before the district court and Seventh Circuit.

know who ultimately gave or did not give as a result of a direct, personal solicitation and thus the solicitation could not affect the openmindedness or create party bias in a judge. *White II*, 416 F.3d at 765-66. The Sixth Circuit struck Kentucky's personal solicitation clause as overbroad because it prohibited a broad range of solicitations, including speeches to large groups and signed mass mailings. *Carey*, 614 F.3d at 204-207. And the Eleventh Circuit struck Georgia's personal solicitation clause as insufficiently tailored because allowing a committee to do what a candidate could not did not lessen the risk that a judge would be tempted to rule one way or another based on a solicitation. *Weaver*, 309 F.3d at 1323. That these courts found different aspects of the clause to be the source of the clauses' demise on its face does not negate the fact that they were all found facially unconstitutional.

A split remains among the circuits as to the standard of review for and, in turn, the constitutionality of the endorsement clause and the personal solicitation clause. Petitioner's writ should be granted.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari and decide this matter on the merits.

Respectfully submitted,

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No. 10-405

In the
Supreme Court of the United States

JOHN SIEFERT, Judge,
Circuit Court of Wisconsin, Milwaukee County,
First Judicial Administrative District,
Petitioner,

JAMES C. ALEXANDER, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Motion for Leave to File Brief Amicus Curiae and Brief of *Amicus Curiae* Center for Constitutional Jurisprudence in Support of Petitioners

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Amicus Center for Constitutional Jurisprudence has received consent to file this amicus brief from Petitioner. Respondent, however, declined consent stating that it was the policy of the Wisconsin Department of Justice "neither to oppose nor to consent to amicus requests, but rather leave it up to the Court to decide for itself whether to hear from amici."

The Center believes the issue presented in this petition goes to the heart of the First Amendment. At issue is the attempted suppression of election-related speech. If permitted, amicus will argue that the protection of this speech is at the core of the First Amendment. It does not matter that the election is for judicial rather than executive or legislative office. The majority of the states have chosen to select and/or retain judicial officers via election. This decision makes sense in light of the work of the state courts. While states are not required to use elections for the selection of judges, once they have chosen to do so they may not suppress election-related speech without a narrowly tailored regulation that advances compelling interest.

WHEREFORE, the Center for Constitutional Jurisprudence seeks leave to file the accompanying brief amicus curiae.

DATED: October, 2010.

Respectfully submitted,

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QUESTION PRESENTED

In the absence of a compelling interest, may a state restrict the election-related speech of candidates for judicial office.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is dedicated to upholding the principles of the American Founding, including the proposition that the Founders intended to encourage election-related speech. The fact that the election at issue is for judicial office does not alter the core value protected by the First Amendment. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases concerning election related speech, including *Citizens United v. Fed. Election Comm'n*, 558 U.S. 50 (2010) and *Doe v. Reed*, 130 S.Ct. 2811 (2010).

REASONS FOR GRANTING REVIEW

Notwithstanding this Court's ruling in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), state courts continue to put restrictions on the election speech of judges and judicial candidates. Elections have been the dominant method of selecting and/or retaining state judges for more than a century of our history. Nonetheless, the subject of judicial elections continues to generate controversy – especially among state judicial incumbents that write the rules for judicial candidates.

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[1] Pursuant to Rule 37.2, all parties were given notice of this brief at least 10 days prior to filing. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

There are few subjects that display the legal profession's federal-centric view of the law more than the election of state court judges. Judges (especially federal judges), lawyers, and academics immediately frame the notion of judging in terms of the federal judiciary. We train our students in law schools to think primarily about the federal courts. The few classes taught that do not involve resort to federal law are often taught with reference to a 50-state norm, and the policies of any particular state -- and more importantly, who developed those policies and how – are rarely discussed.

This narrow consideration, however, invariably leads to erroneous conclusions – or at least conclusions based on an erroneous premise. There are good policy reasons for judicial elections at the state level. These reasons are grounded in the differences between state and federal courts.

Federal courts are courts of limited jurisdiction. They only have that power granted under Article III of the Constitution. *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1148-49 (2009), *Flast v. Cohen*, 392 U.S. 83, 94 (1968). As such, federal courts are not empowered to create a general "common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). This arrangement allows the argument that federal judges are like umpires calling balls and strikes. THEODORE MCKEE, *JUDGES AS UMPIRES*, 35 HOFSTRA L.REV. 1709 (2006-2007) (quoting testimony of Chief Justice Roberts to Senate Judiciary Committee). To be sure, federal judges exercise their individual judgment in making those calls, but they are not engaged in the task of writing the rules of the game. *Id.*

State court judges, by contrast, make law. As participants in a "common law" judicial process, state judges are not merely enforcing and interpreting laws. Instead, these judges are actively writing laws and legal norms for their jurisdictions. ANTONIN SCALIA, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW 12 (1997).

An example can be found in the California decision of *Li v. Yellow Cab Co.*, 13 Cal. 3d 804 (1975). In that case, the California Supreme Court decided that henceforth California would no longer adhere to the doctrine of contributory negligence, but would instead apply the rule of comparative fault in tort cases. *Id.* at 814. This decision overturned "the long-standing principle that one should not recover from another for damages brought upon oneself" a rule that had "been the law of this state from its beginning." *Id.* at 804. Not only did the court overturn more than a century of California precedent in order to reach this ruling, but also a statute enacted by the state legislature codifying that precedent. *Id.*

This is not to say that the California decision was wrong or that the new policy it adopted is not more socially beneficial. It is only to highlight the fact that state courts are engaged in law making and not simply case resolution. *See also Katzberg v. Regents of University of California*, 29 Cal. 4th 300, 331-32 (2002) (Brown, J. dissenting)(arguing that the court's constitutional interpretation was based more on notions of common law than the text), JAMES GARDNER, *THE FAILED DISCOURSE OF STATE CONSTITUTIONALISM*, 90 Mich. L. Rev. 761, 765-66

(1992), HANS LINDE, *ARE STATE CONSTITUTIONS COMMON LAW*, 34 Ariz. L. Rev. 215 (1992).

While state courts generally exercise the lawmaking powers only in the context of deciding cases (*but see*, *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973) (upholding power of the court to issue rules authorizing prejudgment interest in tort actions)), it must be remembered that state courts are not bound by the same standing and jurisdiction doctrines that limit the actions of Article III courts. *See Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Most states recognize doctrines such as taxpayer and citizen standing, allowing virtually any person to invoke the court's lawmaking jurisdiction. *See, e.g.*, *Van Atta v. Scott*, 27 Cal. 3d 424, 449 (1980) (permitting taxpayer standing in a suit for declaratory relief), HANS LINDE, *THE STATE AND FEDERAL COURTS: VIVE LA DIFFERENCE!*, 46 Wm. & Mary L. Rev. 1273, 1275 (2005) ("state courts routinely allow individual taxpayers to challenge official acts with trivial fiscal impacts.").

Indeed, the lawmaking power of a court is in some ways superior to that of the Legislature. While legislators are free to rewrite laws of the previous terms, judicial actors invoke stare decisis to limit (or at least slow) reconsideration of past judicial lawmaking. SCALIA, *supra* at 7.

It is no surprise, therefore, that state constitutional conventions would decide that judicial officers ought to be selected and or retained by popular election. Indeed, every state admitted to the union since 1846 included a provision for judicial election in its Constitution. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 371 (1973).

There is some debate in the legal literature about the purpose behind the elections of state judicial officers. One school of thought argues that the elections were chosen as a vehicle to increase judicial independence – to take the decision out of the hands of politicians. *See* ROY A. SCHOTLAND, *MYTH, REALITY PAST AND PRESENT, AND JUDICIAL ELECTIONS*, 35 Ind. L. Rev. 659, 660 (2002).

There is also evidence, however, that citizens wanted to exercise some control of their own. This point of view was evidence by a complaint from a delegate to the Kentucky constitutional convention of 1849-1850, referring to appointed judges as "'the last dying kick of aristocracy.'" THOMAS PHILLIPS, *ELECTORAL ACCOUNTABILITY AND JUDICIAL INDEPENDENCE*, 64 Ohio State L. J. 137 (2003). This view of judges as aristocrats was inadvertently seconded by the Albany Law Journal two decades later when the journal published an editorial complaining that "a herd of dissatisfied farmers have an ignorant demagogue in the seat of an able and upright judge." 8 Albany L.J. 18 (1873), quoted in FRIEDMAN, *supra* at 372. The editorial went on to opine that "[t]he people are the worst possible judges of those qualifications essential to a good judge." *Id.*

Notwithstanding such complaints, however, state voters in judicial elections generally elect the most qualified candidates. CHRIS BONNEAU, *VACANCIES ON THE BENCH: OPEN-SEAT ELECTIONS FOR STATE SUPREME COURTS*, 27 Just. Sys. J. 143, 146 (2006). Indeed, the argument can easily be made that the outcome of state judicial elections reflect "smart political choices by voters." MELINDA HALL, *THE CONTROVERSY OVER ELECTING JUDGES AND*

ADVOCACY IN POLITICAL SCIENCE, 30 Just. Sys. J. 284, 285 (2009).

Far from discouraging voter involvement in the selection of judges, hard-fought, contested elections generate more voter interest and participation. *Id.* Professors Hall and Bonneau have addressed this in a book-length study, demonstrating that more campaign information generates more voter participation. CHRIS BONNEAU & MELINDA HALL, IN DEFENSE OF JUDICIAL ELECTIONS 2009. If this is the case, what type of government interest would the First Amendment permit to suppress election speech? Given that suppression of election speech will result in the suppression of voter participation, amicus suggests that nothing short of a compelling interest would support such a regulation.

This Court has already rejected the notion that the values of the First Amendment and judicial impartiality are advanced by state policies that require candidates for judicial office to keep secret their views on matters of controversy. *Republican Party*, 536 U.S. at 775-76. After all, the *reality* of an impartial judiciary cannot be affected by whether a candidate keeps her views to herself or announces those views during an election campaign. To say that requiring candidates to keep their views concealed from voters advances the goal of the *perception* of fairness is to deprive the value from any semblance of meaning. If we only care about what the public might think is happening rather than what is really at play in judicial law making, we advance cynicism as the constitutional value rather than impartiality.

Judicial actors and candidates are not blank slates. Nor are they required to live out their terms in cloistered silence. Even aside from the judicial officer's own First Amendment rights of political speech and participation, voters have a genuine need for information about judicial candidates. The more time and money those candidates spend on providing that information, the more voters participate in the process and the more informed those voters will be. HALL at 288. Conversely, the greater the restriction on judicial campaign speech, the lower the voter participation and the less informed the electorate. Any state regulation that has the effect of suppressing voter participation in an election by reducing information for the electorate strikes at the core of the First Amendment.

Nonetheless, state courts continue to apply some or all of the restrictions suggested by the American Bar Association in Model Rule 4.1 of the 2007 Model Code of Judicial Conduct. Wisconsin is not alone in this restriction of election speech. Amicus is familiar with California judicial elections and notes that California also imposes some of these same restrictions, including the prohibition on endorsing other candidates. California Code of Judicial Conduct, Cannon 5. Under the California Code, judicial candidates are prohibited from holding a position in a political organization or endorsing candidates for office.

Unlike the ABA Model Code, however, the California Code contains an exception permitting the endorsement of other *judicial* candidates. *Id.* California explains this rule by asserting that "judicial officers [and presumably judicial

candidates] ... are in a unique position to know the qualifications necessary to serve as a competent judicial officer." Comment to Canon 5, Cal. Code Jud. Conduct. This is an echo of the 1873 complaint in the Albany Law Journal that voters do not know enough to make wise decisions. However, any lack of voter knowledge is due to state restrictions on election speech by judicial candidates.

By restricting some types of information and permitting others, state judiciaries are attempting to dictate the information that will be available to voters. State officials may not, however, dictate the issues to be discussed in an election campaign. *Republican Party*, 536 U.S. at 782.

These rules deprive judicial candidates and officers of their rights to engage in political discourse and deprive voters of the information necessary to make electoral decisions. The natural result of the restriction of information is lack of voter participation in judicial elections. Whether or not suppression of voter interest is a purpose of these restrictions it is clear that that is the effect of the regulation. This Court should grant review to ensure that any state regulation that has the effect of suppressing voter participation is narrowly tailored and is supported by a compelling interest.

CONCLUSION

In his concurring opinion in *Republican Party*, Justice Kennedy noted:

> Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its

> definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer.

536 U.S. at 794 (Kennedy, J., concurring). Yet in the eight years since this Court decided *Republican Party*, states continue to restrict what voters may hear and what candidates may say. At the core of the First Amendment is the right to participate in the political process. This Court ought to grant review to ensure that no state regulation that has

the effect of suppressing voter participation is permitted unless narrowly tailored to advance a compelling governmental interest.

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Respectfully submitted,

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